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No. 420

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BANCO DO BRASIL, S. A., *Petitioner*,

v.

A. C. ISRAEL COMMODITY CO., INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

FRANK E. NATTIER, JR.
300 Madison Avenue
New York 17, New York

ANSEL F. LUXFORD
1210 18th Street, N.W.
Washington 6, D. C.

Attorneys for Petitioner

Of Counsel:

PEHLE, MANN, RIEMER
& LUXFORD
RICHARD L. NEWMAN

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Banco do Brasil, S. A., prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York which affirmed the vacating of petitioner's attachment of respondent's property.

OPINION BELOW

In granting respondent's motion to vacate petitioner's warrant of attachment, the Supreme Court of New York, Special Term, wrote an opinion reported

at 215 N.Y. Supp. 2d 5 and printed at R. 190-201.[1] The decision of the Appellate Division, New York Supreme Court, First Department, affirming the Special Term (R. 217-221), and its order granting leave to appeal to the Court of Appeals (R. 223-228) were both without opinion. The majority and dissenting opinions of the Court of Appeals are reported in 12 N.Y. 2d 371, 239 N.Y.S. 2d 872, and are printed as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1963 and is printed as Appendix B to this petition. The time for filing this petition was extended to August 31, 1963, by order of Mr. Justice Harlan entered June 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Does the national policy of the United States as evidenced by its adherence to the International Monetary Fund Agreement prevent a State Court from refusing on grounds of State policy to consider the civil claim of an instrumentality of the Government of Brazil for the dollars of which Brazil was deprived by a fraudulent conspiracy to evade Brazil's exchange control laws on dollar payments for coffee exports?[2]

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[1] The "R" references are to the folios of the Papers on Appeal From Order which constituted the record in the New York Court of Appeals.

[2] Petitioner reserves the right, if certiorari be granted without limitation, to urge also that, entirely apart from the International Monetary Fund Agreement, the Court below was wrong in refusing to consider petitioner's claim.

TREATY AND STATUTE INVOLVED

The relevant provisions of the Articles of Agreement[3] of the International Monetary Fund,[4] 60 Stat. 1401, TIAS 1501, are set forth in Appendix C.[5]

The Bretton Woods Agreements Act, 59 Stat. 512, 22 U.S.C. § 286, which authorizes and implements the acceptance by the United States of its obligations under the Fund Agreement, provides in part as follows:

> **"Sec. 286. Acceptance of Membership by United States in International Monetary Fund**
>
> "The President is authorized to accept membership for the United States in the International Monetary Fund * * * provided for by the Articles of Agreement of the Fund * * * as set forth in the Final Act of the United Nations Monetary and Financial Conference dated July 22, 1944, and deposited in the archives of the Department of State * * *."

STATEMENT

Petitioner initiated these proceedings by filing suit in the Supreme Court of the State of New York, County of New York, to recover on behalf of Brazil the dollars of which Brazil was deprived by a fraudu-

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[3] Hereinafter sometimes called the "Fund Agreement," or the "International Monetary Fund Agreement," or simply "the Agreement."

[4] Hereinafter sometimes called the "Fund".

[5] The relevant provisions are: Opening clause, Introductory Article, Article I; Article IV, Sections 1, 2, 3, 4, 5 and 6; Article V, Sections 1, 2, 3(a)(i) and (iv) and 5; Article VI, Sections 1 and 3; Article VII, Sections 1, 3 and 5; Article VIII, Sections 1, 2, and 3; Article XIV, Sections 2, 3, 4, and 5; Article XV, Section 2; Article XVIII; and Article XX.

lent conspiracy in evasion of Brazil's exchange control laws relating to dollar payments for coffee exports (R. 49-84). The named defendants to petitioner's action and alleged participants in the fraudulent conspiracy were a group of coffee importers located in New York City and coffee exporters located in Brazil (R. 52-60). Petitioner obtained an attachment on the property of respondent, one of the New York City coffee importers (R. 19, 31). Before answering petitioner's complaint, respondent moved to vacate the attachment (R. 7) on the ground that petitioner's complaint fails to state a cause of action because "it would require enforcement of" Brazil's "internal exchange laws and regulations" (R. 21-22, 31). The facts alleged by petitioner were thus admitted for the purpose of decision, and are the facts here. They are as follows:

Petitioner, a quasi-governmental agency of Brazil, is entrusted under Brazilian law with the supervision of all matters pertaining to Brazil's foreign exchange laws, and the responsibility for recovering on behalf of Brazil any sums due to Brazil under such laws (R. 50-52). At all times here relevant those laws prohibited the purchase and export of coffee unless and until the foreign exchange proceeds were assigned to petitioner as agent for Brazil. For each United States dollar so assigned, the coffee exporter got 90 Brazilian cruzeiros (R. 60-68).

Coffee exports account for approximately seventy percent of Brazil's entire foreign exchange income, used by it to pay for its imports, to service its external debt obligations, and to meet its other requirements for foreign exchange. And Brazil's acquisition of United States dollars pursuant to such foreign ex-

change control laws as applied to coffee exports was and is a vital factor to its economy (R. 68-69).

Respondent and its co-conspirators, knowing of Brazil's laws requiring surrender of dollar payments for coffee exports, conspired to evade those laws and defraud Brazil of the dollar payments for coffee exported. The methods used and to be used by the conspirators were to clear shipments of coffee from Brazil by the falsification and forging of documents showing assignment of the dollar proceeds of sale to petitioner when in fact no such assignments had been made. On the contrary, and in violation of the Brazilian foreign exchange laws, the dollar proceeds from such coffee sales were transferred by the conspiring importers in New York directly to the secret account of the conspiring Brazilian exporters. By these falsifications, forgeries, evasions and other tortious acts, the Brazilian exporters would get the then free market rate of approximately 220 Brazilian cruzeiros for each dollar instead of 90 cruzeiros as the Brazilian law provided, and their New York partners in the conspiracy would profit by buying coffee at less than market price (R. 69-76; 133-140).

The conspirators were so far successful that in about only one month, February 1961, 36,730 bags of coffee were exported pursuant to the conspiracy, and the lawfully requisite assignment of approximately $1.8 million to Brazil was evaded. The demand of petitioner's complaint is for damages for the dollars so lost (R. 70; 76-83).

Against respondent's contention that the complaint fails to state a cause of action because it would be against New York's policy to enforce the foreign ex-

change laws and regulations of another country, petitioner relied in New York's courts on the adherence of the United States to the whole of the Fund Agreement as preventing any such application of State public policy. Petitioner also urged that Article VIII, Section 2(b), of the Agreement,[6] standing alone, required consideration of its claim. Justice Nathan at Special Term recognized the question of the effect of the Fund Agreement as one of first impression (R. 196-197). However, Article VIII, Section 2(b), is the only provision of the Fund Agreement discussed in Justice Nathan's opinion and considered by him relevant, apparently because, as the Justice stated, it is "[t]he only provision of the Bretton Woods Agreement which refers to acts of private individuals" (R. 197-200).[7] Since Article VIII, Section 2(b), was

[6] It provides as follows: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."

[7] This reasoning, as well as that of the majority opinion in the Court of Appeals, undoubtedly reflects the fact that heretofore the New York courts have been mainly concerned with the application of the Fund Agreement in the broad context of the enforceability of exchange contracts and, accordingly, may be assumed to have focused their attention on Article VIII, Section 2(b) of the Fund Agreement. (See *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E. 2d 6, (1953); *Southwestern Shipping Corp.* v. *National City Bank of New York*, 6 N.Y. 2d 454, 190 N.Y.S. 2d 352, 160 N.E. 2d 836 (1959), cert. denied 361 U.S. 895; *Stephen* v. *Zivnostenska Banka National Corporation*, 140 N.Y.S. 2d 323 (1955); *In re Sik's Estate*, 205 Misc. 715, 129 N.Y.S. 2d 134 (1954); *Brill* v. *Chase Manhattan Bank*, 220 N.Y.S. 2d 903, 14 App. Div. 2d 852 (1961). As a result the Court of Appeals of

found inapplicable to petitioner's claim, petitioner was held to have no cause of action by reason of New York's policy against enforcement of "laws furthering foreign governmental interests"—in this instance "internal currency regulations of Brazil" (R. 192, 200). The Appellate Division affirmed without opinion (R. 217-221).

The Court of Appeals affirmed by a four to three decision. The majority opinion, written by Burke, J., with which Van Voorhies, Foster and Scileppi, J.J., concurred, discussed but this one provision of the Fund Agreement, i.e., Article VIII, Section 2(b), found such provision inapplicable, and so refused consideration to petitioner's claim because "one State does not enforce the revenue laws of another," and there is "nothing in the * * * Agreement * * * to the contrary." See Appendix A, pp. 1a-6a. The dissenting opinion, written by Desmond, Ch.J., with which Dye and Fuld, J.J., concurred, held that "the membership of our Federal Government in the International Monetary Fund and other Bretton Woods enterprises[8] makes it impossible to say that currency control laws

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New York, prior to the case at bar, had not really been called upon to consider the impact of the Fund Agreement *as a whole* in the way that this Court was called upon to consider it in *Kolovrat* v. *Oregon*, 366 U.S. 187. That courts generally, and the New York courts in particular are having difficulty in assimilating the Fund Agreement into their domestic law is apparent. See J. Gold, *The Fund Agreement in the Courts*, published by the International Monetary Fund, 1962.

[8] Namely, the International Bank for Reconstruction and Development (World Bank), the Articles of Agreement of which were prepared at the same international conference and which the United States also accepted pursuant to the Bretton Woods Agreements Act, 59 Stat. 512, 22 U.S.C. § 286.

of other member States are offensive to our public policy." See Appendix A, pp. 1a-6a.

We respectfully refer this Court to pp. 18ff, *infra*, for our statement of the detailed provisions of the Fund Agreement, and the effect of United States adherence thereto as evidencing our national policy as encompassing all of the Fund Agreement, rather than an isolated single provision thereof (i.e., Article VIII, Section 2(b)), and as making the Fund and its effective operation one of the cardinal and indispensable tenets in the whole of this nation's international foreign economic policy.

INTRODUCTORY

This petition basically requests this Court to interpret the Fund Agreement in the light of its full national and international context. That context, we submit, is reflected by the words of Secretary of the Treasury Dillon. When Undersecretary of State and testifying in 1959 before the House Committee on Banking and Currency, he stated:[9]

> "These two institutions [Fund and World Bank]—one to promote world monetary stability, the other to assist in world economic development—were the outgrowth of the cumulative financial experience of many years, and most particularly of the interwar period. They were born of the conviction that international financial cooperation is indispensable to prosperity and peace. * * *

[9] Hearings Before Subcommittee No. 1 of the House Committee on Banking and Currency on H.R. 4452 to amend the Bretton Woods Agreements Act by increasing the United States subscription to the Fund, 86th Cong., 1st Sess., pp. 41 and 42. Hereinafter cited as "House Hearings—1959".

"Since World War II economic problems have come to assume truly major proportions in our overall diplomacy. Indeed, the economic is now so pervasive in all our foreign relations that it is hard to find a single major problem which a modern statesman would regard as purely political or purely military. Today the safety of the American citizen depends as much upon the ability of the United States and other free world countries to meet the Communist economic challenge as it does upon their ability to exert military force. And that ability to exert military force is in turn dependent upon the strength of the economic underpinning. The great spiritual struggle taking place between communism and freedom throughout the world of today is itself posed largely in economic terms.

"The form, as well as the content, of our foreign relations has also been transformed. To national instruments of policy and bilateral relations between nations there has been added a new and influential instrumentality: The multilateral institution. In the field of economic relations, the Fund and the Bank are outstanding examples of multilateral institutions which have furthered objectives considered vital to the interests of the United States.

"We continue to require national instruments of economic policy. * * * But it is no exaggeration to say that without the International Monetary Fund and the World Bank the financial burden on the United States would be far greater, and the prospects of building a sound economic system in the free world would be far less."

REASONS FOR GRANTING THE WRIT

1. In Deciding That the National Policy of the United States as Evidenced by its Adherence to the International Monetary Fund Agreement is Not Inconsistent With Its Refusal to Consider Petitioner's Claim, the New York Court of Appeals Has Decided a Federal Question of Substance in a Way That is Not in Accord With the Applicable Decision of This Court in Kolovrat v. Oregon, 366 U.S. 187.

Petitioner, as the instrumentality of a recognized and friendly Government, has the general right to sue in our Courts, state and federal alike.[10] By a four to three majority of its Court of Appeals, New York has cut off petitioner's right to sue in the New York courts on the ground that the Brazilian exchange control laws are foreign "revenue" laws which the State of New York will not enforce.[11] In so holding, the

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[10] The right is accorded to all recognized and friendly sovereigns by international law. See, *The Sapphire* v. *Napoleon III*, 11 Wall (78 U.S.) 164, 167; *Compania Espanola de Navegacion Maritima S.A.* v. *Spanish Steamship Navemar*, 303 U.S. 68, 74. It would seem also to be a necessary consequence of both the due process clause, and the right of the Federal Government to recognize and treat with foreign sovereigns.

[11] In depriving the plaintiff of the use of its courts, New York relied upon a doctrine developed by accident and now widely discredited outside New York as outmoded and archaic. It has even been subject to severe criticism in the New York courts.

The rule had its origin in *Boucher* v. *Lawson*, Cases Temp. Hardwicke 85, 95 Eng. Reprint 53 (1734), where the court held that it was no defense to an action to recover gold to allege that plaintiff and defendant were *participes criminis* in that they had jointly shipped such gold from Portugal in violation of Portuguese law. Subsequently Lord Mansfield observed: "No country ever takes notice of the revenue laws of others." *Holman* v. *Johnson*, 1 Cowper 341, 98 Eng. Reprint, 1120, 1121 (1775). The anomaly of the doctrine developed from those facts and those words has been shown by Judge Steuer in his dissent, criticizing the New York

Court of Appeals has deprived petitioner of any remedy against the tortious conduct of those New

rule, in *City of Philadelphia* v. *Cohen*, 222 N.Y.S. 2d 226 at pp. 227-228:

> "This terse and powerful expression has been perpetuated and iterated in its original form or in a paraphrase in virtually every opinion involving the extraterritorial effect of the statutes comprising financial liability. The phrase itself becomes the law in extension of the principle it so colorfully illustrated. * * *
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> * * * * *
>
> "* * * Thus, an expression uttered in connection with private litigation has now had the effect of barring a foreign sovereign from suing to collect taxes, an appreciable extension of the idea of not allowing a foreign revenue law to interfere with the enforcement of a private contract.
>
> * * * * *
>
> "Such a rigid distinction between tax collections of other states and suits for local taxes, resulting in the absolute exclusion of the former, has no basis in public policy and should not be reflected in the law. A tax evader remains a tax evader even though he crosses the state boundary, and it is difficult to discover what purpose is served by making immunity a concomitant of his defection."

His criticism accords with the modern trend. *Oklahoma* v. *Rogers*, 238 Mo. App. 1115, 193 S.W. 2d 919 (1946); *Oklahoma* v. *Neely*, 225 Ark. 230, 282 S.W. 2d 150 (1955); *Detroit* v. *Gould*, 12 Ill. 2d 297, 146 N.E. 2d 61 (1957); *Ohio* v. *Arnett*, 314 Ky. 403, 234 S.W. 2d 722 (1950); *Holshouser Co.* v. *Gold Hill Corporation*, 138 N.C. 248, 50 S.E. 650 (1905). See also, 18 *Cornell L.Q.* 581; 29 *Col. L.R.* 782; 46 *Harv. L.R.* 193; 47 *Mich. L.R.* 796. This court, moreover, in *Milwaukee County* v. *M. E. White*, 296 U.S. 268 (1935), when confronted with argument in support of the doctrine, held that a judgment for taxes obtained in one state was entitled to full faith and credit in another, but expressly noted that it was not passing upon the specific question of whether one state should be permitted to sue in another's courts to collect taxes not reduced to judgment. While the doctrine probably remains the law in England today, the House of Lords in *Regazzoni* v. *K. C. Sethia, Ltd.* (1957) 3 All E. R. 286, 292-296, went to considerable pains to point out that its premises may deserve reconsideration in the light of modern conditions.

York defendants who cannot be reached elsewhere. The majority and the minority of the Court of Appeals both considered whether the national policy of the United States evidenced by the Fund Agreement[12] prevents such application to foreign exchange control laws of State public policy against enforcement of foreign "revenue" laws. The majority ignored *Kolovrat* and confined its discussion to only Article VIII, Section 2(b) of the Agreement. By that process of analysis nothing was found in the Fund Agreement to bar the application of State public policy so as to defeat petitioner's right to sue. See Appendix A, pp. 1a-6a. The minority concluded (Appendix A, p. 5a), as the Court of Appeals had already noted in an earlier case (*Perutz* v. *Bohemian Discount Bank*, 304 N.Y. 533, 537), that "the membership of our Federal Government in the International Monetary Fund and other Bretton Woods enterprises makes it impossible to say that the currency control laws of other member States are offensive to our public policy."

This Court, in *Kolovrat*, considered the effect of United States adherence to the International Monetary Fund Agreement upon State public policy. The Court held that the Agreement "comprehensively obligates participating countries to maintain only such monetary controls as are consistent with the terms of that Agreement" (366 U.S. at 197). No difficulty was encountered in finding that "[t]he Agreement's broad purpose, as shown by Article IV, Sec. 4, is 'to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid

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[12] 60 Stat. 1401, TIAS 1501; and see Appendix C.

competitive exchange alterations' " (366 U.S. at 197). The Court concluded that the adherence of the United States to the Fund Agreement is a part of programs "adopted" by the United States and "deemed desirable in bringing about so far as can be done, stability and uniformity in the difficult field of world monetary controls and exchange."

Hence, the Court held in *Kolovrat* that Oregon could not validly cut off the right of Yugoslavia's nationals to inherit American property by interposition of Oregon's objections to exchange controls maintained by Yugoslavia as an adherent to the Fund Agreement. In so doing, the Court noted the claim by the Yugoslav nationals and the United States as *amicus*, that Yugoslavia so administered its exchange control laws as to permit the remittance of inheritances to United States nationals. But it preferred to rule that regardless of the correctness of such claim, the "supervening United States-Yugoslavian arrangements", i.e., bilateral agreements and the Fund Agreement, made this issue irrelevant.[13] Here, New York has cut off petitioner's right to sue in New York's courts by interposition of New York's policy against

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[13] The unanimous holding of the Court on the point was succinctly stated by Mr. Justice Black (366 U.S. at pp. 196-197):

"Oregon law, its Supreme Court held, forbids inheritance of Oregon property by an alien living in a foreign country unless there clearly exists as a matter of law an unqualified and enforceable right for an American to receive payment in the United States of the proceeds of an inheritance of property in that foreign country. * * * Petitioners and the United States urge that no such doubt or uncertainty is created by the Yugoslavian law, but contend that even so this Oregon state policy must give way to supervening United States-Yugoslavian arrangements. We agree with petitioners' latter contention."

enforcement of foreign "revenue" laws.[14] In effect, therefore, New York has interposed such State policy to defeat petitioner's right to recover in its courts for losses sustained through defendant's successful conspiracy to violate Brazilian exchange control laws allowed by the Fund Agreement to which Brazil, like the United States, adheres.[15] This, it is submitted, was tantamount to New York's barring such actions because the enforcement of Brazilian exchange controls is offensive to the policy of New York. New York's action cannot stand consistently with *Kolovrat*.

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[14] The minority opinion in the instant case correctly challenged the proposition that the enforcement of foreign exchange laws is to be likened to enforcement of foreign revenue laws. The minority opinion accords with the position of the English Courts which also adhere to the doctrine of not enforcing foreign revenue laws. See *Kahler* v. *Midland Bank, Ltd.*, [1949] 2 All E.R. 621. Exchange control laws, being intended to protect the currency of a country rather than its revenue, are not revenue laws. Petitioner concedes that Brazil, in company with numerous other less financially advanced members of the Fund, employs and has employed a multiple exchange rate system of exchange controls; and that as applied to coffee exports of the type here involved, the legal rate available for coffee exports did have the secondary effect of generating revenue. Petitioner's position is that, even conceding that the exchange regulations here involved had an incidental revenue facet, that feature did not impair their status under the Fund Agreement; and, hence, New York cannot seize upon any such accidental feature to interpose its state policy in derogation of our clear-cut national policy to cooperate with all members of the Fund in all phases of their monetary and exchange problems comprehended within the Fund Agreement. Since the Fund Agreement recognizes the right of members to maintain exchange controls, including even multiple rates (Fund Agreement, Art. VIII, Sec. 3), New York cannot, directly or indirectly, interpose a state policy to nullify the national policy in the premises.

[15] Brazil was one of the original members of the Fund. See Selected Documents—Board of Governors Inaugural Meeting—March 8-18, 1946, International Monetary Fund, 1946, p. 44.

The impingement of Oregon's public policy on Yugoslavia's exchange controls was tangential. Oregon sought merely to prevent private citizens of Yugoslavia from inheriting property in Oregon. Here it is Brazil itself which has lost approximately $1.8 million by the fraud against its exchange controls (R. 83) in which New York defendants participated. The stakes for dishonesty in this area are large. The damage for dollars so lost to the hard pressed Brazilian economy is correspondingly high. It strikes at the very heart of Brazil's capacity to maintain stable and orderly exchange arrangements and undermines Brazil's obligations to the United States and all other member countries of the Fund—including Brazil's financial obligations to the Fund itself. Only restoration of the dollars lost can repair the injury to Brazil and her economy. If, as New York says, the main American defrauders can sit safely in the world's coffee market in New York and retain the profits of this fraud on Brazil's exchange controls, the prejudice to the effective operation and maintenance of such exchange controls in facilitating the stabilization of Brazil's economy is direct and great. And if Brazil, through the petitioner, cannot reach these defendants doing business in New York and force them to disgorge their spoils, where can they be reached? And how can such a result be squared with the obligations of the United States under the Fund Agreement, to cooperate fully with other parties signatory in the fields of international exchange and monetary stability?

2. In Finding Nothing in the International Monetary Fund Agreement to Prevent Application of Its Own State Policy, the Court of Appeals Has in Effect Applied Its Own "Foreign" Policy, Ignored the National Foreign Policy Evidenced by United States Adherence to the Fund Agreement, and Evaded the Decisions of This Court in United States v. Pink, 315 U.S. 203; United States v. Belmont, 301 U.S. 324; and United States v. Curtiss-Wright Export Corp., 299 U.S. 304, Which Enforce National Foreign Policy as Paramount.

The United Nations Monetary and Financial Conference (commonly called "Bretton Woods" or the "Bretton Woods Conference") of 1944 which resulted in the Fund Agreement was called upon the invitation of the President of the United States. It was preceded by the many years of extensive American staff work in conjunction with foreign experts that made the Conference possible. Our Treasury, State, and Commerce Departments, the Board of Governors of the Federal Reserve System, and other interested departments and agencies of the Government all participated.[16] The effort was a continuation and extension of United States foreign policy going back to 1934. Destructive and competitive exchange practices of individual nations in the early thirties had sharply reduced world trade and contributed to fascism and war.[17] As the House Committee on Banking and Currency in recommending the Bretton Woods Agreements Act pointed out:

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[16] United Nations Monetary and Financial Conference, Final Act and Related Documents, Department of State Publication 2187, Conference Series 55, U.S.G.P.O. (1944), pp. 1, 5-6. Hereinafter cited as "Conference Series 55". H. Rept. 629 by the House Banking and Currency Committee on H.R. 3314, the Bretton Woods Agreements Act, 79th Cong., 1st Sess., pp. 7-8. Hereinafter cited as "H. Rept. 629".

[17] H. Rept. 629, pp. 11-14; Conference Series 55, pp. 4-5.

> "It was recognized that exchange problems are international in character and that no unilateral policy can, in fact, succeed. For this reason, the policy of the United States since 1934 has been directed toward securing international cooperation for the maintenance of stable and orderly exchange rates and the elimination of restrictive and discriminatory exchange practices."[18]

Prior limited attempts had been made.[19] However, the United States called the Bretton Woods Conference, and took the lead in its proceedings,[20] in the belief, as expressed by the head of the United States delegation at the Conference, that "the disruption of foreign exchanges *can* be prevented, and the collapse of monetary systems *can* be avoided, and a sound currency basis for the balanced growth of international trade *can* be provided" by "a permanent institution for consultation and cooperation on international monetary, finance and economic problems" such as the International Monetary Fund.[21] The Fund Agreement was needed in dealing "with the problems of international exchange" because those problems are

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[18] H. Rept. 629, p. 14. See also, Report from the Senate Banking and Currency Committee on H.R. 3314, the Bretton Woods Agreements Act, No. 452, 79th Cong., 1st Sess., p. 30. Hereinafter cited as "S. Rept. 452".

[19] Our earlier efforts "to facilitate the maintenance of orderly exchanges," such as the 1936 Tripartite Agreement with England and France (subsequently adhered to by Belgium, the Netherlands, and Switzerland), and a number of bilateral exchange arrangements with our Latin American neighbors starting in 1937, had been of some help. Conference Series 55, p. 5; H. Rept. 629, p. 14.

[20] H. Rept. 629, p. 8.

[21] See the address by Secretary of the Treasury Morgenthau, Jr., President of the Bretton Woods Conference; Inaugural Plenary Session, July 1, 1944, Conference Series 55, p. 6.

"beyond the capacity of any one country, or of any two or three countries," because they "are multilateral problems to be solved only by multilateral cooperation."[21a] And President Roosevelt when inaugurating the Bretton Woods Conference succinctly observed "that the things we need to do, must be done—can only be done—in concert." He saw the proposal for a Fund Agreement as "an enduring program of future economic cooperation."[22]

This keynote of a policy of international cooperation in formulating and carrying out the Fund Agreement, initially expressed at the Bretton Woods Conference by President Roosevelt and Secretary Morgenthau, was emphasized again and again by both of the Congressional Committees in recommending the Bretton Woods Agreements Act to enable United States participation in the Fund Agreement.[23]

We turn first to the provisions of the Fund Agreement (see Appendix C) to see what our national policy of international cooperation covers. Article I sets forth the purposes of the Agreement which, it is specifically provided, shall guide the Fund in all of its decisions. The purposes include the promotion of "international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration", facilitation of "the expansion and balanced growth of international trade" so contributing to "the promotion and maintenance of high levels of employment" and "to the development

[21a] *Id.* p. 5.

[22] *Id.* p. 2.

[23] See H. Rept. 629, pp. 2, 5, 6, 9, 17, 20, 21, 28, 30, 58, and 60; S. Rept. 452, pp. 6, 29-30.

of the productive resources of all members" "as primary objectives of economic policy"; the promotion of "exchange stability," the maintenance of "orderly exchange arrangements among members, and to avoid competitive exchange depreciation"; assistance in "the establishment of a multilateral system" of current transaction payments and "elimination of foreign exchange restrictions which hamper the growth of world trade"; the making of the Fund's reserves available to members so that maladjustments in their balance of payments can be corrected "without resorting to measures destructive of national or international prosperity"; and, in accordance with the foregoing purposes, the shortening of the duration and the lessening of the "degree of disequilibrium in the international balances of payments of members."

To effectuate the foregoing purposes, the Agreement provides for each member country establishing, in agreement with the Fund, a par value[24] for its currency expressed in terms of gold or the United States dollar (Article IV), and obligates each member "to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations".

To assist members in maintaining the par value (exchange rate) of their currencies in times of temporary dislocations in their balance of payments, a revolving fund of gold and member currencies is set up by subscription of all the members. Articles III and IV.

[24] Through the fixing of a par value for each currency in terms of gold or dollars, exchange rates between currencies are established as ratios thereof. *Cf.* Article IV, Sections 3 and 4. Appendix C pp. 10a, 11a.

At the time the Fund commenced exchange operations in 1947, it had a revolving fund, representing member country subscriptions, of approximately the equivalent of $6.5 billion.[25] By 1960, following action by the Fund in 1959 to increase member country subscriptions, this amount had been increased to approximately $14.3 billion.[26] As a consequence of a further supplementary agreement in 1961-62 between the Fund and ten of its major "hard currency" members, including the United States, the Fund obtained commitments for the advance to it under certain conditions of additional "hard currency" resources in the dollar equivalent of approximately $6 billion,[27] so that the Fund today has aggregate resources equal to approximately $21.2 billion.[28] Of this total, the United States

[25] International Monetary Fund, Annual Report 1947, Washington, D.C., p. 29. Technically, each member of the Fund contributes as its "subscription" the amount of its "quota" as fixed by the Fund. Therefore, "subscriptions" and "quotas" should be exactly interchangeable. However, because a few monetarily unimportant countries have failed to pay in the amount of their quotas because of extraordinary conditions (e.g., Nationalist China), there is in fact a slight variance between "quotas" and paid-in "subscriptions". The amount of the variance is so slight in terms of the aggregate figures involved that such terms will be used interchangeably in this Petition when referring to the aggregate assets of the Fund. See, Fund Agreement, Article III, Secs. 1 and 3; International Financial Statistics, International Monetary Fund, Wash., D.C., May, 1963, p. 6.

[26] International Monetary Fund, Annual Report, 1960, Washington, D. C., pp. 163-166; 186; and 187.

[27] International Monetary Fund, Summary Proceedings, Annual Meeting, 1962, Washington, D.C., pp. 19-20.

[28] As of March 31, 1963, aggregate Fund Quotas were $15.223 billion. See International Financial Statistics, International Monetary Fund, Washington, D. C., May, 1963, p. 6. The addition of the $6 billion the Fund is authorized to borrow under certain conditions in convertible currencies makes a total of $21.2 billion.

originally subscribed $2.75 billion in gold and dollars in 1946.[29] This subscription was increased to $4.125 billion in 1959[30] and was further augmented in 1962 by an agreement to lend the Fund up to $2 billion under certain conditions.[31] Thus, the United States financial stake in the Fund today aggregates $6.125 billion. Since Fund stabilization operations with member countries are on a short term, revolving credit basis with repayment in three years, and an outside limit of five years, these massive resources of the Fund, in the aggregate potential amount of $21.2 billion, provide it with a powerful voice in international monetary and exchange matters.

The Fund commenced operations in 1946 with 35 member governments adhering to the Fund Agreement.[32] Today it numbers 91 countries as members.[33] Under the Fund's system of weighted voting related

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[29] International Monetary Fund, Annual Report, 1947, Washington, D.C., p. 66.

[30] International Monetary Fund, Annual Report, 1960, Washington, D. C., p. 197.

[31] 22 U.S.C. 286(e).

[32] International Monetary Fund, Annual Report (Report of the Executive Directors and Summary Proceedings), 1946, Washington, D.C., p. 7.

[33] Fund Press Release No. 450, July 10, 1963. While Russia was one of the participating governments at the Bretton Woods Conference, it did not accept membership in the Fund. Poland and Czechoslovakia did accept membership but were forced to withdraw following communist takeover. Yugoslavia has been a member of the Fund since its inception. House Hearings—1959, pp. 38, 39; Hearings Committee on Foreign Relations, United States Senate on S. 1094, a bill to amend the Bretton Woods Agreements Act, 86th Cong., 1st Sess., pp. 30-31. Hereinafter cited as "Senate Hearings —1959".

to the amount of each member government's subscription (Article XII, Sec. 5), the United States today casts a vote of approximately 24% of the total voting power of the Fund.[34]

Each member undertakes not to engage in discriminatory currency arrangements, exchange control restrictions on current payments, or in "multiple currency transactions," that is, different exchange rates for different types of transactions (e.g., exports, imports, services, capital transfers, etc.), *except as authorized by the Agreement or approved by the Fund* (Article VIII, Sections 2 and 3). The Agreement, itself, authorizes and provides for exchange restrictions in five different situations. First, exchange restrictions and practices already in force at the time of the Agreement may be maintained, but "the member concerned shall consult with the Fund as to their progressive removal," unless they are otherwise authorized by the Agreement (Article VIII, Section 3). Second, in order to avoid flights of capital, members may impose exchange controls but not so as to restrict payments for current transactions unless such controls are otherwise authorized by the Agreement (Article VI, Section 3). Third, when the Fund declares a particular currency to be scarce, any member is authorized, after consultation with the Fund, to impose temporary limitations on the freedom of exchange operations in the scarce currency (Article VII, Section 3). Fourth, under Article XIV, members may in the post-war transitional period maintain exchange re-

[34] Hearings before the House Committee on Banking and Currency on H.R. 10162, a bill to amend the Bretton Woods Agreements Act, 87th Cong., 2nd Sess., p. 48. Hereinafter cited as "House Hearings—1962."

strictions on current international transactions, and may adapt such restrictions to changing circumstances. Members are obligated, however, to "have continuous regard" for the purposes of the Fund and are required to withdraw such restrictions as soon as their balance of payments position will permit. Fifth, the member is authorized to impose new restrictions or controls on exchange transactions if it obtains the Fund's approval therefor (Article VIII, Sec. 2(a)). Moreover, the Fund may require a member to impose exchange controls as a condition to obtaining access to the Fund's resources (Article VI, Sec. 1(a)).

All of the foregoing types of exchange controls or restrictions were and are included in the program of international cooperation initiated by, promoted by, and agreed to by the United States, and Congress was specifically advised of, and approved, these measures. As the Congress saw it, many countries would have to maintain, and would be expected to maintain necessary exchange restrictions for the conservation of their exchange resources and the reconstruction of their economies. The countries maintaining them must be given time and help in restoring their international economic positions. At the same time, these restrictions and the complex and specialized problems they represent would be under the supervision of the Fund, and under that supervision the restrictions will be lessened and removed as soon as economic conditions permit. The alternative to the Fund Agreement would be competitive and destructive currency depreciations and practices, and greater and more intensive exchange restrictions than necessary, with no provision at all for their gradual removal. The Congressional Committees concerned explicitly emphasized

these considerations in recommending the Bretton Woods Agreements Act to provide for the adherence of the United States to the Fund Agreement and the participation of the United States in its effective operation.[35]

It is sometimes assumed that one of the purposes of the Fund was the elimination of all foreign exchange restrictions. However, this overlooks that the applicable Fund Agreement "Purpose" is "To assist * * * in the elimination of foreign exchange restrictions *which hamper the growth of world trade*" (Article I(iv)). In other words, the stated goal is not the elimination of all restrictions but only those hampering the growth of world trade. That seventeen years after the Fund commenced operations exchange restrictions abound may appear disconcerting to the purist who overlooks the pivotal questions of the difficulties of the problems involved and of the degree to which such restrictions are hampering world trade. That they abound is self-evident from the *Fourteenth Annual Report, Exchange Restrictions*, dated May 23, 1963, published by the Fund pursuant to Article XIV, Section 4, of the Fund Agreement.[36] Thus, virtually all member countries still have exchange controls or restrictions of one type or another, even including the United States with respect generally to transactions in gold,[37] and on a more limited basis to all financial transactions with North Korea and Mainland China[38]—

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[35] See, H. Rept. 629, pp. 4, 5, 11-12, 15, 16, 20, 23-24, 25, 51, 56-57; and S. Rept. 452, pp. 8, 9, 11-12, 18, 20, 23.

[36] Hereinafter cited as "Fourteenth Report".

[37] Gold Reserve Act of 1934, 48 Stat. 337, 31 U.S.C. 442-444 and regulations in effect thereunder, 31 C.F.R. Part 54.

[38] Fourteenth Report, pp. 396-397.

to which Cuba was added on July 8, 1963.[39] The important point is not the universality of exchange controls or restrictions in one form or another; rather it is that their impact on world trade is policed by the Fund to the end of diminishing or negating their adverse impact on world trade. In this context it is not surprising that a rapidly developing but still underdeveloped country like Brazil has exchange restrictions;[40] and under the Fund Agreement their effectiveness must not be frustrated by other Fund members by the interposition of a national or state policy to a contrary effect.

Article VIII, Section 2(b), the only provision of the Agreement expressly discussed by New York's courts, makes exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member, maintained or imposed consistently with the Fund Agreement, unenforceable in the territories of all members. This does make it clear, as the majority opinion in the Court of Appeals in this case recognizes, that the Fund Agreement makes such contracts unenforceable in the territory of any member. But to conclude, as the majority opinion did, that this one subsection of the Fund Agreement represents the sum total of the Fund's impact on the domestic law of member countries as applied to private persons is, indeed, a novel doctrine. It would be less novel and surprising if the implied premise of the Court's position were correct, but it clearly is incorrect. Thus, the logic of the Court's analysis is, in effect, that since Article VIII,

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[39] 28 F.R. 6974; 31 C.F.R. Sec. 515.101 *et seq*

[40] Fourteenth Report, pp. 43-53.

Section 2(b) is the only provision in the Fund Agreement which specifically deals with the rights of private persons, therefore, only such provision has any direct legal impact on the rights of private parties. But it is respectfully submitted that this misconceives the whole purpose of Section 2(b). Its purpose was not to specify the only point of legal impact between the Fund Agreement and private persons. On the contrary, its primary purpose[41] was to note the single case in which the Fund Agreement changes ordinary conflict of law principles as to the effect to be given in the forum to the exchange control laws of other members. In effect Section 2(b) modified ordinary conflict rules to the extent of saying that regardless of where such exchange contracts were entered into, and regardless of whether such contract was legal in the place it was made, or in the place where it was to be performed, or in the place where suit was brought, the single fact that it involved another member's currency, and was contrary to that member's exchange control regulations, became the controlling factor which required all courts in every member country to declare the contract unenforceable. That this is the correct analysis of the significance of Section 2(b) is borne out by an official interpretation of the Fund made pursuant to Article XVIII of the Fund Agreement. (By that Article such interpretations are made binding on all member governments.) Section 2(b) of the Agree-

[41] Section 2(b) has the secondary effect of extending its sanction concerning unenforceability to all of a member's exchange *control* laws maintained consistently with the Fund Agreement regardless of whether the control is in fact an exchange *restriction* on payments under the Agreement. This, too, evidences the expansory effect and intent of such section and negates a connotation of limitation.

ment was made the subject of an official interpretation by the Fund on June 14, 1949. In the course of such interpretation, the Fund stated:[42]

> "An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy, (*ordre public*) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. *It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.*" (Emphasis added.)

This clearly demonstrates that the Fund itself holds that the effect of Section 2(b) was to modify ordinary conflict of law principles which might otherwise produce contrary results.

Moreover, if the majority opinion in the Court of Appeals is correct in holding that only Section 2(b) is of relevance as between private parties, then it necessarily follows that this Court was wrong in *Kolovrat*. *Kolovrat* did not, in any way, involve an "exchange contract" or an application of Section 2(b) of the Fund Agreement, yet in that case this Court found that the existence of the Fund Agreement, and United States adherence thereto, modified applicable Oregon

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[42] International Monetary Fund, Annual Report, 1949, Washington, D.C., p. 82.

law and the legal rights of the private parties involved. In short the position of the New York Court of Appeals on this issue is squarely in conflict with this Court's analysis in *Kolovrat*. New York must give meaning and content to the whole of the Fund Agreement if the doctrine of *Kolovrat* is to stand. This, we submit, is a matter which this Court should consider and decide.

The commitment of the United States to the Fund Agreement and to the international principles and policies it embraces was not an isolated act dating back to our adherence thereto in 1945. The Fund is a living institution drawing its vitality and sustenance from the continuing cooperation and support of its member governments as pledged by their adherence to the Agreement. Moreover, it was not just designed to cope with those problems its founders could foresee in 1944. It has and is demonstrating its viability and capacity to meet changing circumstances and conditions.

In 1945 when the Congress first considered United States adherence to the Fund Agreement, the concept was how the Fund could help other friendly nations with weak currencies and the role of the United States was primarily that of providing the dollar and moral support to make such efforts viable.[43] By 1959 when the Congress was considering the proposal to increase our subscription to the Fund by $2 billion, the Fund had demonstrated that it not only had the capacity and resources to come to the aid of smaller countries, but it had demonstrated during the post-Suez exchange

[43] House Report 629, pp. 23-25, 54, 55; *cf.* Senate Hearings—1959, p. 35.

crises of 1956-57 that it could throw massive reserves to protect even the British pound sterling.[44] In the words of Secretary Anderson:

> "I am sure that we would have had financial crises that would have caused far greater difficulty, had we not had the fund, for example, standing as a line of secondary reserves, bolstering the confidence of countries when they undertake difficult problems of eliminating multiple exchange rates, or undertake some kind of fiscal or economic reform."[45]

Undersecretary of State Dillon in 1959 before the Senate Foreign Relations Committee underscored this growth in stature of the Fund when he stated:

> "But whether it has operated alone or in combination with United States or other programs, the Monetary Fund has in country after country greatly furthered the cause of national monetary stability and international freedom of trade and payments. The recent dramatic moves of the United Kingdom, France, Germany, and other European countries toward currency convertibility, which will help to remove discriminatory

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[44] "In little more than a year, dollar drawings [from the Fund] amounted to $1.6 billion, and standby commitments reached almost another billion dollars."—Secretary of the Treasury Anderson, House Hearings—1959, p. 7; Senate Hearings—1959, pp. 7, 21, 96. The Fund gave Britain a standby credit in 1956 of $738 million and "was an essential element in restoring confidence in the pound, and it helped give Britain time to adjust its economic affairs so that it could build up reserves."—Hon. John J. McCloy, Senate Hearings—1959, p. 54. Again in 1961 when the pound sterling was under heavy pressure the United Kingdom drew on the Fund for the equivalent of $1.5 billion and at the same time entered into a standby arrangement with the Fund for an additional $500 million. House Hearings—1962, p. 17.

[45] House Hearings—1959, p. 22.

restrictions against American and other free world trade, were due in no small part to the earlier activity of the International Monetary Fund, including its vital support of the pound sterling in 1956 and its help to France in 1958.

"The Fund's past accomplishments have demonstrated the value of this institution to the United States and to the rest of the free world. The proposed increase in quotas will strengthen the Fund in carrying forward international financial policies which have fully proven their worth in the national interests of the United States."[46]

* * *

"The Bank and Fund together have come to occupy a key position in the structure of free world economic cooperation. They have furthered principles of international economic behavior identical with those underlying our own foreign economic policies. They have helped to mobilize in support of those principles the economic resources of many countries, thus easing the financial burden on themselves. An expansion of the activities of both institutions is required in order to bring a greater economic strength and cohesion to the free world as a whole. For these reasons the Department of State strongly supports the proposed legislation enabling an increase in their financial resources."[47]

There is no indication that the drafters of the Fund Agreement in 1944 or Congress in 1945 anticipated that the day might come when the United States itself would need to look to the Fund for foreign exchange reserves. Nothing in the 1945 Congressional hearings

[46] Senate Hearings—1959, p. 58.

[47] Senate Hearings—1959, p. 61. *Cf.* House Hearings—1959, pp. 37 and 46.

admitted seriously of such a premise.[48] Even as late as 1959 when strengthening the Fund's resources was again before Congress, there was no intimation that the United States might need to seek the Fund's financial assistance[49]—albeit there was official recognition that the United States was faced with pressure on its balance of payments and a drain on its gold reserves.[50] But three years later in 1962 there was clear-cut official recognition of the very real possibility of the United States needing to draw on the Fund. President Kennedy in asking Congress for authority to provide more dollar resources to the Fund stated:

> "In my message of last February 6, I discussed the imbalance in our international payments and called for a series of related measures to correct it. A number of these measures have been adopted. But the problem is stubborn and complex and will require additional action over a number of years.
>
> "Meanwhile, we can strengthen the monetary system in general and the position of the United States in that system by augmenting the resources and flexibility of the International Monetary Fund to permit the Fund to be utilized more effectively in supporting a healthy and growing world economy.
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> * * *
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> "*It would, in particular, greatly enhance the ability of the Fund to assist the United States in coping with its international payments problems.* * * * The new arrangements would permit an additional $3 billion increase in available resources of these other major currencies, *and would thus*

[48] *Cf.* H. Rept. 629, and S. Rept. 452.

[49] House Hearings—1959; Senate Hearings—1959.

[50] Senate Hearings—1959, pp. 42-44.

assure the Fund the assets needed to meet a request for a drawing by the United States should such a request ever be necessary. At a time when the confidence in the dollar is of utmost importance to the free world, the $6 billion addition to the Fund will be especially significant. *It will greatly enhance our own financial resources* and greatly reduce any possibility of a serious drain upon dollar balances."[51] (Emphasis added.)

In fact the situation was so apparent that the Fund in concert with ten of its member countries with the strongest currencies, including the United States, entered into special hard-currency commitments, aggregating an additional $6 billion, so that the Fund would have the resources to meet massive drawings of the type which would be involved if the United States had to draw on the Fund.[52] Events since 1962 have not written a happy ending to this nation's balance of payments problems, nor solved the problems for which the Fund was established. The President in his Special Message to Congress on Balance of Payments on July 18, 1963, brought these problems into perspective. He announced that the United States had requested and obtained from the Fund a $500 million standby arrangement, and disclosed plans for the further strengthening of the Fund to permit adequate provi-

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[51] House Hearings—1962, pp. 5 and 6; *Cf.* Special Report of National Advisory Council (NAC) to the President and Congress, *Id.*, pp. 7-24.

[52] NAC Special Report *Ibid.* pp. 7-24; See also testimony of Secretary of the Treasury Dillon before House and Senate Committees, House Hearings—1962, pp. 33-39, and 74; Hearings, Committee on Foreign Relations, United States Senate, on H.R. 10162, a bill to amend the Bretton Woods Agreements Act, 87th Cong., 2nd Sess., pp. 2-8. Hereinafter cited as "Senate Hearings—1962."

sion to be made "for the growth of international liquidity to finance expanding world trade over the years ahead." As a further indication of this country's increasing concern with respect to its own balance of payments position, the President proposed a tax on the purchase by United States citizens of foreign securities as a means of relieving the pressure.[53]

Such is the record of United States adherence to the Fund Agreement, and it offers positive proof of the heavy interdependence between our own national policy and that of the Fund. But just as the Fund has grown in stature to the point where even this country depends upon its resources as a second line of foreign exchange reserves, so too, in quite another field, the Fund has demonstrated its capacity to deal with international monetary problems which this country frankly acknowledges are beyond its diplomatic competence or that of any other single member of the Fund. This is the contribution of the Fund, as a non-political international agency, in counseling and advising member countries on monetary and stabilization matters. In discussing the Fund's assistance to its less developed member countries in working out their currency stabilization programs, Undersecretary of State Dillon told the House Banking and Currency Committee in 1959:

> "In country after country the Monetary Fund has assisted its members to carry out sound financial policies in a spirit of cooperation with fellow members. As an international organization it is better able to advise sovereign governments on sensitive matters of financial policy, or to insist

[53] See, New York Times, July 19, 1963, pp. 30, 31.

on appropriate corrective measures in return for credits, than are other sovereign governments.

"This, I think, deserves to be underlined. In the delicate area of fiscal and monetary policy, governments find it much easier to accept the counsel of an objective, impartial, and highly competent international organization than the advice of other governments no matter how good or well-intentioned. The weight of the Fund's counsel and its influence is enhanced by the exceptional technical ability of its staff and its management.

"As an international organization of recognized experience and competence in its field, the Fund has become a powerful force for international cooperation in financial matters and for sound financial policies. Its objectives have been similar to those of our own foreign financial policy; and its achievements have been of the greatest help to the national interests of the United States."[54]

It is in the light of the Fund's record of assisting underdeveloped member nations to cope with the implacable problems and strains development imposes upon their monetary systems and exchange stability that this Court will want to focus upon the implications of the decision of the New York Court of Appeals in this case upon the problems of Brazil and our commitment to support the Fund. Certainly Brazil is one of the countries belonging to the Fund which has great need for its assistance; and the Fund has assisted it both with advice and hard resources and standby credits (aggregating $368 million as of March 31, 1963).[55] Certainly, too, Brazil has stringent exchange

[54] House Hearings—1959, p. 43. See also, *Id.* p. 46; Senate Hearings—1959, pp. 56-58, 63.

[55] International Financial Statistics, International Monetary Fund, Washington, D.C., May, 1963, p. 4.

controls which in an ideal world, Brazil, the Fund, this country and the New York Court of Appeals would like to see eliminated.[36] But Brazil, the Fund and our own Government must face the facts as they are and cope with reality. For this Government this realism took the form of adhering to the Fund Agreement and granting to the Fund the responsibility of working out these seemingly intractable problems. In short, the fixed national policy of the United States as reflected by its adherence to the Fund Agreement is to yield to the Fund's wisdom, power and diplomacy in the field of the exchange restrictions of other members, and to accept its judgment on whether or not such restrictions are in conformity with the Fund Agreement.

But the inescapable corollary to this delegation to the Fund on our part would seem to be that our national policy must support and implement the Fund in the discharge of responsibilities so delegated. If the Fund finds or accepts a need for exchange controls or restrictions in Brazil, and if the Fund Agreement permits such controls, then our national policy must be to accept this position and cooperate with the Fund and Brazil to the end of making the Brazilian controls effective and, thus, assist her in coping with one of her most vital problems. This we respectfully submit is the underlying basis of this Court's decision in *Kolovrat*.

But what of the majority opinion of the New York Court of Appeals in this case? Against the record of the United States' commitment under the Fund Agreement and our national policy to support the Fund with respect to the whole of such Agreement, what has New

[36] Fourteenth Report, pp. 43-53.

York decided? To find nothing in this record of our commitment to the Fund which would prevent application to Brazilian exchange laws of a conflicting and more parochial State policy against enforcement of foreign revenue laws—this is to ignore entirely both the record and the Agreement. That is what the majority of the Court of Appeals has done in this case. New York's policy militates against the effectiveness of the Brazilian exchange controls and restrictions which the Fund accepts as necessary and with respect to which it is our national policy to cooperate. The consequent encouragement by New York of frauds upon necessary exchange controls does not promote the stable and orderly exchange arrangements sought by our national policy of adherence to the Fund Agreement. New York's policy, adopted for reasons that are irrelevant to the Fund Agreement and our adherence thereto, leaves no room for international cooperation in the effective maintenance of exchange laws pending the day Brazil's economic conditions will permit of their removal. In effect, New York condemns Brazil's exchange laws here and now without regard to the necessities of our national foreign policy, and without regard to this Court's decisions in *Belmont*, *Pink*, and *Curtiss-Wright*, which enforce such national policy as paramount.

In applying its own interpretation of the Fund Agreement to find there is no national policy covering the instant situation, New York has used a back-door approach to avoid the rule clearly established in *U. S. v. Belmont*, 301 U.S. 324. There this Court at pages 331-332 stated:

> "Plainly, the external powers of the United States are to be exercised without regard to state

laws or policies. * * * And while this rule in respect of treaties is established by the express language of cl. 2, Art. 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. Compare United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 316, et seq., ante, 255, 57 S. Ct. 216. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision."

The unified national policy on exchange controls declared by the Congress in authorizing and facilitating United States' participation in the Fund Agreement would be wrecked if New York and her sister states were left free to apply any number of varying state "foreign policies" to exchange controls under the guise of state public policies based on local concerns or this more parochial outlook.[37] So, too, if New York and her sister states were each left free to make "foreign policy" by individual interpretations of the Fund Agreement.[38] To use the precisely appropriate lan-

[37] With respect to the possible consequences of the various states making "foreign policy", see Mr. Justice Miller in *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876):

"If that [Federal] government has forbidden the States to hold negotiations with any foreign nations, or to declare war,

guage of *United States v. Pink*, 315 U.S. 203, 231-232, "[e]nforcement of New York's policy . . . would collide with and subtract from the Federal policy," and the "action by New York, no matter what gloss be given it, amounts to official disapproval or non-recognition" of Brazil's exchange controls. That New York cannot do. The Federal policy of cooperation in the effective operation of such controls is binding on all of the states of the Union.

3. In Any Event, If Reversal Is Not Required by the Decisions of This Court, the Question Presented Is One of Wide Significance in Our Foreign Policy Which Has Not Been But Should Be Determined by This Court.

Besides the United States and Brazil some 89 other countries adhere to the International Monetary Fund Agreement.[38] Under the Fund's supervision approximately 55 of these countries as of the end of 1962, continue to maintain necessary exchange restrictions which like Brazil's include the compulsory surrender or sale of export proceeds to the Government or officially designated agents.[39] None of the countries adhering to the Fund Agreement is self-sufficient. Particularly in comparatively underdeveloped countries like Brazil, and even more so in countries that are largely

[and has taken the whole subject of these relations upon herself, has the Constitution, which provides for [illegible] done so foolish a thing as to leave it in the power of the states to pass laws whose enforcement renders the General Government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible? . . . The Constitution of the United States is no such instrument. * * * If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."

[38] Fund Press Release, July 10, 1963.

[39] Fourteenth Report.

underdeveloped, export proceeds must be controlled and husbanded to pay for essential imports. The question presented in this case is thus seen to be one of extremely wide application.

The particular circumstances of this case are that coffee exports, with the United States as largest customer, constitute seventy percent of Brazil's entire foreign exchange resources (R. 92). The immediate loss to Brazil's economy from the fraud in this case is large. But the ultimate loss to Brazil's economy, if the decision below be permitted to stand, must be infinitely greater. The American participants in the fraud here are not small fly-by-nighters. They constitute a group of large, representative coffee importers by most standards considered reputable. Certainly petitioner would be the first to concede that once the law of the United States makes it clear that frauds on the exchange control laws of other member countries of the Fund are actionable here, responsible American firms will no longer be parties to conspiracies to perpetrate such frauds. But if they can freely defraud Brazil and other members of the Fund with impunity, who will not! And even the most honest and meticulous coffee importer will be driven to participating in such frauds because of the pressures of price competition from others. Thus, the economic well-being of the people of Brazil, the stability of its currency, its Government and its free institutions, in which we as a nation have so large an interest, will be seriously prejudiced.

But Brazil serves only as an example. The United States is the world's largest customer. New York City is a large, if not the largest center of America's international trade. If the decision below stands, other

states with ports for international trade can follow New York in applying their own varying notions of state public policy or "foreign policy" to the exchange controls of other member countries maintained pursuant to the Fund Agreement. Frauds and other deleterious operations against such exchange controls will become rampant and the United States nationals who participate therein can continue to do so with impunity. Our national policy of seeking to stabilize the economies and develop the free institutions of these friendly countries of the world can be seriously impaired.

And the burden of such damage to our national policy will be largely upon the American taxpayer. The United States is firmly committed to a policy of foreign aid in support of friendly countries. Our Alliance for Progress and our Agency for International Development both grant and lend to friendly countries the dollars above their own dollar resources, which are needed to avert disaster for their economies and political institutions. The magnitude of our foreign economic aid (military aid excluded) may be gauged from the fact that since the end of World War II we have provided grants and loans to other countries aggregating $66.5 billion and for the year 1962 the figure was $5 billion.[60] To Brazil alone we have provided $1.7 billion since World War II, with $202 million for only 1962[61]—with commitments made in March of this year for a further $540 million

[60] U.S. Foreign Assistance and Assistance from International Organizations, Obligation and Loan Authorizations, July 1, 1945–June 30, 1962 (Revised), Agency for International Development, Statistics and Reports Division (April 24, 1963), p. 1.

[61] *Id.*, p. 31.

through 1963 and part of 1964 in cooperation with further financing of Brazil by the Fund and other international organizations.[62] If the decision below goes unreviewed, a shortage in the Brazilian economy of $1.8 million must be made up either in more aid from the United States and other countries or by less consumption and investment in Brazil. Yet the shortage from the fraud in this case is but an example of the much larger shortages that can be expected from other frauds against the exchange restrictions of Brazil and other members of the International Monetary Fund. In this connection it is noteworthy that the fraud alleged to have occurred here in the amount of $1.8 million was during February 1961. On May 16, 1961—three months later—the Fund announced that Brazil had entered into a one year stand-by arrangement with the Fund for the equivalent of $160 million and a rescheduling of payments to the Fund against previous drawings totalling the equivalent of an additional $140 million.[63] While the announcement did not and could not state how much of this $300 million actually involved the Fund's supplying United States dollars to aid Brazil—and thus intensifying our own balance of payments problems—it is fair to assume that the dollar as the leading international currency bore the brunt of this transaction. In short, as Brazil loses millions due to the connivance of American importers against its exchange controls, the United States and the Fund are simultaneously called upon to replace them—and the New York courts stand aloof and disinterested at Brazil's efforts to recapture its losses through such frauds!

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[62] Dept. of State Bulletin, April 15, 1963, p. 557 at 561.

[63] Fund Press Release No. 352, May 17, 1961.

Unfortunately the national problems which result from the decision of the Court of Appeals are not of a temporary nature. Realistically, we know and recognize that exchange restrictions will continue to be needed by some countries for a long time in order to ameliorate serious balance of payments problems. Meanwhile the adverse effects of the decision below (if it be unreviewed and not reversed) upon foreign exchange restrictions, our foreign policy, and our taxpayers will mount. Indeed, if by reason of state policy, the United States as the world's largest consumer is to become a "fence" for evaders of foreign exchange restrictions, the happy day of stable democracies with free conversion of currencies so long sought by our foreign policy at a cost of tens of billions may never be achieved.

Today it is Brazil seeking the cooperation of the United States and its courts in protecting the integrity and stability of its monetary system and economy. Let us not overlook the fact that tomorrow it may be this country seeking the cooperation of other member countries of the Fund in trying to recoup for losses of our gold holdings through violation of the Gold Reserve Act or of the President's newly announced program for taxing certain exports of capital which are putting undue pressure on our balance of payments. The cooperation we offer to Brazil today may be a measure of the cooperation we may anticipate from other member countries in meeting our possible problems of tomorrow.

* * * * *

Finally, this case raises in concrete terms the question of which way the courts of this country will turn when confronted with the problems inherent in the

free world's first modest steps toward effective delegation of areas of responsibility to international agencies. Will it be in the direction of the majority opinion in the New York Court of Appeals? Will we close our eyes to the whole form and spirit of the endeavor by quoting the words (and misquoting the substance) uttered by Lord Mansfield in a different day with different horizons.[64] Or will this Court adhere to the path it blazed in *Kolovrat?* In short, provided by the Fund Agreement with one of the free world's first concrete attempts toward an effective delegation of power to an international agency, and thus with an international "rule of law" with a clearly defined ambit, will it be the role of our courts to foster and implement our national policy and aspirations in the premises, or will we, as the New York Court sought to do, merely brush the whole subject "under the rug"?

That the Fund and the Fund Agreement represented a new breed of international agency, cloaked with some of the powers of government, was fully recognized when Congress enacted the Bretton Woods Agreements Act. The House Banking and Currency Committee Report quoted with approval from the testimony of Assistant Secretary of the Treasury White:[65]

> "I would like to call your attention to the fact that the Bretton Woods proposals are not like the usual international agreements which have been proposed in the past, dealing with economic matters. They do not contain mere subscriptions to or adherence to a body of pious generalizations. They are not a statement of resolutions which re-

[64] See footnote 11, *supra*.

[65] H. Rept. 629, p. 31.

fleet merely the hope of many nations but which contain no powers, and no resources, and no teeth. It is not that kind of a document.

"The proposals drafted at Bretton Woods consist of institutions with powerful resources. They contain powers which are great and specific and effective, which can influence the well-being of each country."

Nor did the significance of this aspect of the Fund Agreement escape the attention of its critics. Thus the House Minority Report in opposing the Bretton Woods Agreements Act stated:[68]

"The basic structure of the International Monetary Fund and Bank would consist of a coalition of 44 governments and would constitute an authoritarian world-wide trade and monetary cartel. This world-embracing corporate body would usurp the social or private function of carrying on international trade and commerce and substitute therefor authoritarian domination over such pursuits.

* * *

"Now, the only cooperation that is involved in this international monetary scheme is that which is required to bind the governments concerned to a common agreement to take over and operate functions of international lending, of foreign exchange markets, of regulating foreign trade, and so forth, which functions are now being performed by private individuals and institutions.

"Thus, instead of promoting true international cooperation, which the advocates of the scheme so loudly proclaim to be their goal, they would de-

[68] H. Rept. 629, p. 112. See also, *Id.*, p. 121 and Senate Report 452, Part 2, p. 2.

stroy what is left of this and give us in its stead international authoritarianism."

To state these views is not to accept them. Still they do highlight the fact that this country and the Congress knew they were charting a new course for international cooperation, and vesting in the Fund authority and powers hitherto in this country reserved only to the Congress and the President. That the fears of those who opposed United States acceptance of the Fund Agreement in 1945 were unwarranted is evidenced by the fully bipartisan support in Congress in 1959 and 1962 for measures to increase its resources.[67]

It is not necessary at this place and time to attempt to evaluate the full extent to which the United States and the other 90 member governments in the Fund each have yielded some of their freedom of action, plus massive resources, to the Fund in an endeavor to cope with international monetary and exchange problems otherwise not susceptible to separate national action. Suffice it to state that the Fund Agreement is probably the most ambitious attempt in our time, or that of our forefathers, toward limited world government or order in an important but narrow economic field.

But the Fund Agreement does raise, and this case highlights the point, the question of what shall be the attitude of our national courts, and those of the other 90 member governments, when actions taken by a member government, consistent with the Fund Agreement, come up for consideration in the courts of another

[67] House Hearings—1959, Senate Hearings—1959, House Hearings—1962, Senate Hearings—1962.

member. This is a question this Court should decide for the United States; and such decision may well influence the thinking of the courts of the other 90 member governments when they too are called upon to face this issue.

CONCLUSION

Because the decision below is in conflict with *Kolovrat*, because it, in effect, ignores *Pink*, *Belmont*, and *Curtiss-Wright*, and because of the reasons of large national import that we have stated, the petition should be granted.

Respectfully submitted,

FRANK E. NATTIER, JR.
300 Madison Avenue
New York 17, New York

ANSEL F. LUXFORD
1210 Eighteenth St., N.W.
Washington 36, D. C.

Attorneys for Petitioner

Of Counsel:

PEHLE, MANN, RIEMER
& LUXFORD
1210 18th St., N.W.
Washington 36, D. C.

RICHARD L. NEWMAN, ESQ.
17 Battery Place
New York 4, New York

August, 1963

APPENDIX A

BANCO DO BRASIL, S. A., *Appellant*,

v.

A. C. ISRAEL COMMODITY CO., INC., *Respondent, et al., Defendants.*

Decided April 4, 1963.

Burke, J. The action upon which the attachment here challenged is based is brought by appellant as an instrumentality of the Government of Brazil to recover damages for a conspiracy to defraud the Government of Brazil of American dollars by illegally circumventing the foreign exchange regulations of Brazil.

Defendant-respondent, Israel Commodity, a Delaware corporation having its principal place of business in New York, is an importer of Brazilian coffee. The gist of plaintiff's complaint is that Israel conspired with a Brazilian exporter of coffee to pay the exporter American dollars which the exporter could sell in the Brazilian free market for 220 Brazilian cruzeiros each instead of complying with Brazil's foreign exchange regulations which in effect required a forced sale of the dollars paid to the exporter to the Government of Brazil for only 90 cruzeiros. Through this conspiracy, the Brazilian exporter profited by the difference between the amount (in cruzeiros) it would have received for the dollars from the Government of Brazil and the amount it received in the open market in violation of Brazilian law. Israel profited by being able to pay less dollars for the coffee (because the dollars were worth so much more to the seller), and the plaintiff suffered a loss measured by the difference in amount it would have to pay for the same number of dollars in the open market and what it could have paid for them through the "forced sale" had its foreign exchange regulations been obeyed. The evasion was allegedly accomplished through the ex-

porter's forgery of the documents evidencing receipt of the dollars by plaintiff Banco Do Brasil, S. A., and without which the coffee could not have left Brazil.

Plaintiff argues that respondent's participation in the violation of Brazilian exchange control laws affords a ground of recovery because of article VIII (§ 2, subd. [b]) of the Bretton Woods Agreement, a multilateral treaty to which both this country and Brazil are signatories. The section provides: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member." (60 U.S. Stat. 1411.) It is far from clear whether this sale of coffee is covered by subdivision (b) of section 2. The section deals with "exchange contracts" which "involve" the "currency" of any member of the International Monetary Fund, "and * * * are contrary to the exchange control regulations of that member maintained or imposed consistently with", the agreement. Subdivision (b) of section 2 has been construed as reaching only "transactions which have as their immediate object 'exchange,' that is, international media of payment" (Nussbaum, Exchange Control and the International Monetary Fund, 59 Yale L.J. 421, 426), or a contract where the consideration is payable in the currency of the country whose exchange controls are violated (Mann, The Exchange Control Act, 1947, 10 Mod. L. Rev. 411, 418). More recently, however, it has been suggested that it applies to "contracts which in any way affect a country's exchange resources" (Mann, The Private International Law of Exchange Control Under the International Monetary Fund Agreement, 2 International and Comp. L. Q. 97, 102; Gold and Lachman, The Articles of Agreement of the International Monetary Fund and the Exchange Control Regulations of Member States, *Journal du Droit International*, Paris (July-Sept., 1962). A similar view has been advanced to explain the further textual difficulty ex-

isting with respect to whether a sale of coffee in New York for American dollars "involves the currency" of Brazil, the member whose exchange controls were allegedly violated. Again it is suggested that adverse effect on the exchange resources of a member *ipso facto* "involves" the "currency" of that member (Gold and Lachman, op. cit.). We are inclined to view an interpretation of subdivision (b) of section 2 that sweeps in all contracts affecting any members' exchange resources as doing considerable violence to the text of the section. It says "involve the currency" of the country whose exchange controls are violated; not "involve the exchange resources". While noting these doubts, we nevertheless prefer to rest this decision on other and clearer grounds.

The sanction provided in subdivision (b) of section 2 is that contracts covered thereby are to be "unenforceable" in the territory of any member. The clear import of this provision is to insure the avoidance of the affront inherent in any attempt by the courts of one member to render a judgment that would put the losing party in the position of either complying with the judgment and violating the exchange controls of another member or complying with such controls and refusing obedience to the judgment. A further reasonable inference to be drawn from the provision is that the courts of no member should award any recovery for breach of an agreement in violation of the exchange controls of another member. Indeed, the International Monetary Fund itself, in an official interpretation of subdivision (b) of section 2 issued by the Fund's Executive Directors, construes the section as meaning that "the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example, by decreeing performance of the contracts or by awarding damages for their nonperformance". (International Monetary Fund Ann. Rep. 82-83 [1949], 14 Fed. Reg. 5208, 5209 [1949].) An obligation to withhold judicial assistance to secure the benefits

of such contracts does not imply an obligation to impose tort penalties on those who have fully executed them.

From the viewpoint of the individuals involved, it must be remembered that the Bretton Woods Agreement relates to international law. It imposes obligations among and between States, not individuals. The fact that by virtue of the agreement New York must not "enforce" a contract between individuals which is contrary to the exchange controls of any member, imposes no obligation (under the law of the transaction—New York law*) on such individuals not to enter into such contracts. While it does mean that they so agree at their peril inasmuch as they may not look to our courts for enforcement, this again is far from implying that one who so agrees commits a tort in New York for which he must respond in damages. It is significant that a proposal to make such an agreement an "offense" was defeated at Bretton Woods. (1 Proceedings and Documents of the United Nations Monetary and Financial Conference 334, 341, 502, 543, 546—referred to in Nussbaum, Exchange Control and the International Monetary Fund, 59 Yale L.J. 421, 426, 429, *supra*.)

Lastly, and inseparable from the foregoing, there is a remedial consideration which bars recovery in this case. Plaintiff is an instrumentality of the Government of Brazil and is seeking, by use of an action for conspiracy to defraud, to enforce what is clearly a revenue law. Whatever may be the effect of the Bretton Woods Agreement in an action on "A contract made in a foreign country between citizens thereof and intended by them to be there performed" (see *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 537), it is well established since the day of Lord Mansfield (*Holman* v. *Johnson*, 1 Cowp. 341, 98 E. R. 1120 [1775]) that one State does not enforce the revenue laws of another. (*Government of India* v. *Taylor*, 1 All E. R. 292 [1955]; *City of Philadelphia* v.

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*All of respondent's acts allegedly in furtherance of the conspiracy took place in New York where it regularly did business.

Cohen, 11 NY 2d 401; 1 Oppenheim, International Law, § 144b [Lauterpacht ed., 1947].) Nothing in the Bretton Woods Agreement is to the contrary. In fact, its use of the unenforcibility device for effectuation of its purposes impliedly concedes the unavailability of the more direct method of enforcement at the suit of the aggrieved government. By the second sentence of subdivision (b) of section 2, further measures to make exchange controls more effective may be agreed upon by the member States. This is a matter for the Federal Government which not only has not entered into such further accords, but has not even enacted the enabling provision into law (U.S. Code, Tit. 22, § 286h).

Therefore, the order should be affirmed and the certified questions answered no and yes respectively.

Chief Judge Desmond (dissenting). The order should be reversed and the warrant of attachment reinstated since the complaint alleges a cause of action within the jurisdiction of the New York State courts.

If there had never been a Bretton Woods Agreement and if this were a suit to enforce in this State the revenue laws of Brazil it would have to be dismissed under the ancient rule most recently restated in *City of Philadelphia v. Cohen* (11 NY 2d 401). But *Cohen* and its predecessor cases express a public policy which lacks applicability here because of the adherence of the United States to the Bretton Woods Agreement. As we noted in *Perutz v. Bohemian Discount Bank in Liquidation* (304 N.Y. 533, 537), the membership of our Federal Government in the International Monetary Fund and other Bretton Woods enterprises makes it impossible to say that the currency control laws of other member States are offensive to our public policy. Furthermore, the argument from *City of Philadelphia v. Cohen* (*supra*) and similar decisions assumes erroneously that this is a suit to collect internal taxes assessed by the Brazilian Government. In truth, it is not even an effort to enforce Brazil's currency regulations

This complaint and other papers charge a tortious fraud and conspiracy to deprive plaintiff, an instrumentality of the Brazilian Government, of the dollar proceeds of coffee exports to which proceeds the bank and its government were entitled. This fraud, it is alleged, was accomplished by inserting in coffee shipping permits references to nonexistent exchange contracts and to nonexistent assignments to plaintiff of the foreign exchange proceeds of the coffee exports and by forging the signatures of banking officials and Brazilian officials, all with the purpose of making it appear that there had been compliance with the Brazilian statutes or regulations. The alleged scheme and effect of the conspiracy as charged was to obtain for defendant-respondent coffee in New York at a reduced price, to enable the Brazilian defendants to get more "cruzeiros" per dollar in violation of law and to deprive Brazil of the cruzeiros which it would have received from these coffee sales had the fraud not been committed. According to the complaint and affidavits defendant Israel not only knew of and intended to benefit by the perpetration of this fraud but participated in it in New York by making its purchase agreements here and by here receiving the shipping documents and making payments. The Israel corporation is alleged to have been one of the consignees of some 36,000 bags of coffee exported from Brazil to New York in 1961 without compliance with the Brazilian law and thus to have fraudulently and conspiratorially caused to Brazil damage of nearly $2,000,000. Refusal to entertain this suit does violence to our national policy of co-operation with other Bretton Woods signatories and is not required by anything in our own State policy.

Judges Van Voorhis, Foster and Scileppi concur with Judge Burke; Chief Judge Desmond dissents in an opinion in which Judge Dye and Fuld concur.

Order affirmed, with costs. First question certified answered in the negative; second question certified answered in the affirmative.

APPENDIX B

No. 499

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 4th day of April in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur April 4, 1963.

No. 199

BANCO DO BRASIL S. A., *Appellant*,

vs.

A. C. ISRAEL COMMODITY CO., INC., *Respondent*,

UNITED COMMODITIES CORPORATION, & ors., *Defendants*.

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-two, Banco do Brasil, S.A., the appellant—in this cause, came hereunto the Court of Appeals, by Nattier & Anderson, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And A. C. Israel Commodity Co., Inc., the respondent—in said cause, afterwards appeared in said Court of Appeals by Curtis, Mallet-Prevost, Colt & Mosle, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Richard L. Newman, of counsel

for the appellant—, and by Mr. Jerome J. Londin, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs. First question certified answered in the negative. Second question certified answered in the affirmative.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs. Questions certified answered as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 4, 1963.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

/s/ RAYMOND J. CANNON
Clerk

APPENDIX C

Articles of Agreement of the International Monetary Fund

The Governments on whose behalf the present Agreement is signed agree as follows:

Introductory Article

The International Monetary Fund is established and shall operate in accordance with the following provisions:

Article I. Purposes

The purposes of the International Monetary Fund are:

(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments

without resorting to measures destructive of national or international prosperity.

(vi) In accordance with the above; to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The Fund shall be guided in all its decisions by the purposes set forth in this Article.

* * * * * * * * * *

Article IV. Par Values of Currencies

SECTION 1. *Expression of par values.*—(*a*) The par value of the currency of each member shall be expressed in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944.

(*b*) All computations relating to currencies of members for the purpose of applying the provisions of this Agreement shall be on the basis of their par values.

SEC. 2. *Gold purchases based on par values.*—The Fund shall prescribe a margin above and below par value for transactions in gold by members, and no member shall buy gold at a price above par value plus the prescribed margin, or sell gold at a price below par value minus the prescribed margin.

SEC. 3. *Foreign exchange dealings based on parity.*—The maximum and the minimum rates for exchange transactions between the currencies of members taking place within their territories shall not differ from parity

(i) in the case of spot exchange transactions, by more than one percent; and

(ii) in the case of other exchange transactions, by a margin which exceeds the margin for spot exchange transactions by more than the Fund considers reasonable.

SEC. 4. *Obligations regarding exchange stability.*—(*a*) Each member undertakes to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations.

(*b*) Each member undertakes, through appropriate measures consistent with this Agreement, to permit within its territories exchange transactions between its currency and the currencies of other members only within the limits prescribed under Section 3 of this Article. A member whose monetary authorities, for the settlement of international transactions, in fact freely buy and sell gold within the limits prescribed by the Fund under Section 2 of this Article shall be deemed to be fulfilling this undertaking.

SEC. 5. *Changes in par values.*—(*a*) A member shall not propose a change in the par value of its currency except to correct a fundamental disequilibrium.

(*b*) A change in the par value of a member's currency may be made only on the proposal of the member and only after consultation with the Fund.

(*c*) When a change is proposed, the Fund shall first take into account the changes, if any, which have already taken place in the initial par value of the member's currency as determined under Article XX, Section 4. If the proposed change, together with all previous changes, whether increases or decreases,

(i) does not exceed ten percent of the initial par value, the Fund shall raise no objection;

(ii) does not exceed a further ten percent of the initial par value, the Fund may either concur or object, but shall declare its attitude within seventy-two hours if the member so requests;

(iii) is not within (i) or (ii) above, the Fund may either concur or object, but shall be entitled to a longer period in which to declare its attitude.

(*d*) Uniform changes in par values made under Section 7 of this Article shall not be taken into account in determining whether a proposed change falls within (i), (ii), or (iii) of (*c*) above.

(*e*) A member may change the par value of its currency without the concurrence of the Fund if the change does not affect the international transactions of members of the Fund.

(*f*) The Fund shall concur in a proposed change which is within the terms of (*c*) (ii) or (*c*) (iii) above if it is satisfied that the change is necessary to correct a fundamental disequilibrium. In particular, provided it is so satisfied, it shall not object to a proposed change because of the domestic social or political policies of the member proposing the change.

SEC. 6. *Effect of unauthorized changes.*—If a member changes the par value of its currency despite the objection of the Fund, in cases where the Fund is entitled to object, the member shall be ineligible to use the resources of the Fund unless the Fund otherwise determines; and if, after the expiration of a reasonable period, the difference between the member and the Fund continues, the matter shall be subject to the provisions of Article XV, Section 2 (*b*).

. . . . . .

Article V. Transactions with the Fund

SECTION 1. *Agencies dealing with the Fund.*—Each member shall deal with the Fund only through its Treasury, central bank, stabilization fund, or other similar fiscal agency and the Fund shall deal only with or through the same agencies.

SEC. 2. *Limitation on the Fund's operations.*—Except as otherwise provided in this Agreement, operations on the account of the Fund shall be limited to transactions for the purpose of supplying a member, on the initiative of such member, with the currency of another member in exchange for gold or for the currency of the member desiring to make the purchase.

SEC. 3. *Conditions governing use of the Fund's resources.*—(*a*) A member shall be entitled to buy the currency of another member from the Fund in exchange for its own currency subject to the following conditions:

(i) The member desiring to purchase the currency represents that it is presently needed for making in that currency payments which are consistent with the provisions of this Agreement;

• • • • • • • • • • •

(iv) The Fund has not previously declared under Section 5 of this Article, Article IV, Section 6, Article VI, Section 1, or Article XV, Section 2 (*a*), that the member desiring to purchase is ineligible to use the resources of the Fund.

• • • • • • • • • • •

SEC. 5. *Ineligibility to use the Fund's resources.*—Whenever the Fund is of the opinion that any member is using the resources of the Fund in a manner contrary to the purposes of the Fund, it shall present to the member a report setting forth the views of the Fund and prescribing a suitable time for reply. After presenting such a report to a member, the Fund may limit the use of its resources by the member. If no reply to the report is received from the member within the prescribed time, or if the reply received is unsatisfactory, the Fund may continue to limit the member's use of the Fund's resources or may, after giving reasonable notice to the member, declare it ineligible to use the resources of the Fund.

• • • • • • • • • • •

Article VI. Capital Transfers

SECTION 1. *Use of the Fund's resources for capital transfers.*—(*a*) A member may not make net use of the Fund's resources to meet a large or sustained outflow of capital, and the Fund may request a member to exercise controls to prevent such use of the resources of the Fund. If, after receiving such a request, a member fails to exercise appropriate controls, the Fund may declare the member ineligible to use the resources of the Fund.

(*b*) Nothing in this Section shall be deemed

(i) to prevent the use of the resources of the Fund for capital transactions of reasonable amount required for the expansion of exports or in the ordinary course of trade, banking or other business, or

(ii) to affect capital movements which are met out of a member's own resources of gold and foreign exchange, but members undertake that such capital movements will be in accordance with the purposes of the Fund.

. . . . . .

SEC. 3. *Controls of capital transfers.*—Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3 (*b*), and in Article XIV, Section 2.

Article VII. Scarce Currencies

SECTION 1. *General scarcity of currency.*—If the Fund finds that a general scarcity of a particular currency is developing, the Fund may so inform members and may issue a report setting forth the causes of the scarcity and containing recommendations designed to bring it to an

end. A representative of the member whose currency is involved shall participate in the preparation of the report.

* * * * * * * * * * *

SEC. 3. *Scarcity of the Fund's holdings.*—(*a*) If it becomes evident to the Fund that the demand for a member's currency seriously threatens the Fund's ability to supply that currency, the Fund, whether or not it has issued a report under Section 1 of this Article, shall formally declare such currency scarce and shall thenceforth apportion its existing and accruing supply of the scarce currency with due regard to the relative needs of members, the general international economic situation, and any other pertinent considerations. The Fund shall also issue a report concerning its action.

(*b*) A formal declaration under (*a*) above shall operate as an authorization to any member, after consultation with the Fund, temporarily to impose limitations on the freedom of exchange operations in the scarce currency. Subject to the provisions of Article IV, Sections 3 and 4, the member shall have complete jurisdiction in determining the nature of such limitations, but they shall be no more restrictive than is necessary to limit the demand for the scarce currency to the supply held by, or accruing to, the member in question; and they shall be relaxed and removed as rapidly as conditions permit.

(*c*) The authorization under (*b*) above shall expire whenever the Fund formally declares the currency in question to be no longer scarce.

* * * * * * * * * * *

SEC. 5. *Effect of other international agreements on restrictions.*—Members agree not to invoke the obligations of any engagements entered into with other members prior to this Agreement in such a manner as will prevent the operation of the provisions of this Article.

Article VIII. General Obligations of Members

SECTION 1. *Introduction.*—In addition to the obligations assumed under other articles of this Agreement, each member undertakes the obligations set out in this Article.

SEC. 2. *Avoidance of restrictions on current payments.*—(*a*) Subject to the provisions of Article VII, Section 3 (*b*), and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.

(*b*) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

SEC. 3. *Avoidance of discriminatory currency practices.*—No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1, to engage in, any discriminatory currency arrangements or multiple currency practices except as authorized under this Agreement or approved by the Fund. If such arrangements and practices are engaged in at the date when this Agreement enters into force the member concerned shall consult with the Fund as to their progressive removal unless they are maintained or imposed under Article XIV, Section 2, in which case the provisions of Section 4 of that Article shall apply.

. . . . . .

Article XIV. Transitional Period

SEC. 2. *Exchange restrictions.*—In the post-war transitional period members may, notwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances (and, in the case of members whose territories have been occupied by the enemy, introduce where necessary) restrictions on payments and transfers for current international transactions. Members shall, however, have continuous regard in their foreign exchange policies to the purposes of the Fund; and, as soon as conditions permit, they shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability. In particular, members shall withdraw restrictions maintained or imposed under this Section as soon as they are satisfied that they will be able, in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the resources of the Fund.

SEC. 3. *Notification to the Fund.*—Each member shall notify the Fund before it becomes eligible under Article XX, Section 4 (*c*) or (*d*), to buy currency from the Fund, whether it intends to avail itself of the transitional arrangements in Section 2 of this Article, or whether it is prepared to accept the obligations of Article VIII, Sections 2, 3, and 4. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept the above-mentioned obligations.

SEC. 4. *Action of the Fund relating to restrictions.*—Not later than three years after the date on which the Fund begins operations and in each year thereafter, the Fund shall report on the restrictions still in force under Section 2 of this Article. Five years after the date on

which the Fund begins operations, and in each year thereafter, any member still retaining any restrictions inconsistent with Article VIII, Sections 2, 3, or 4, shall consult the Fund as to their further retention. The Fund may, if it deems such action necessary in exceptional circumstances, make representations to any member that conditions are favorable for the withdrawal of any particular restriction, or for the general abandonment of restrictions, inconsistent with the provisions of any other article of this Agreement. The member shall be given a suitable time to reply to such representations. If the Fund finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XV, Section 2 (*a*).

SEC. 5. *Nature of transitional period.*—In its relations with members, the Fund shall recognize that the postwar transitional period will be one of change and adjustment and in making decisions on requests occasioned thereby which are presented by any member it shall give the member the benefit of any reasonable doubt.

Article XV. Withdrawal from Membership

* * * * * * * * * * *

SEC. 2. *Compulsory withdrawal.*—(*a*) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article IV, Section 6, Article V, Section 5, or Article VI, Section 1.

(*b*) If, after the expiration of a reasonable period the member persists in its failure to fulfill any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues, that member may be required to withdraw from membership in the Fund by a decision of the Board of

Governors carried by a majority of the governors representing a majority of the total voting power.

(*c*) Regulations shall be adopted to ensure that before action is taken against any member under (*a*) or (*b*) above, the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing.

Article XVIII. Interpretation

(*a*) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director it shall be entitled to representation in accordance with Article XII, Section 3 (*j*).

(*b*) In any case where the Executive Directors have given a decision under (*a*) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

(*c*) Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The

umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

* * * * * * * * * *

Article XX. Final Provisions

SECTION 1. *Entry into force.*—This Agreement shall enter into force when it has been signed on behalf of governments having sixty-five percent of the total of the quotas set forth in Schedule A and when the instruments referred to in Section 2(*a*) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945.

SEC. 2. *Signature.*—(*a*) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

(*b*) Each government shall become a member of the Fund as from the date of the deposit on its behalf of the instrument referred to in (*a*) above, except that no government shall become a member before this Agreement enters into force under Section 1 of this Article.

(*c*) The Government of the United States of America shall inform the governments of all countries whose names are set forth in Schedule A, and all governments whose membership is approved in accordance with Article II, Section 2, of all signatures of this Agreement and of the deposit of all instruments referred to in (*a*) above.

(*d*) At the time this Agreement is signed on its behalf, each government shall transmit to the Government of the United States of America one one-hundredth of one percent of its total subscription in gold or United States

dollars for the purpose of meeting administrative expenses of the Fund. The Government of the United States of America shall hold such funds in a special deposit account and shall transmit them to the Board of Governors of the Fund when the initial meeting has been called under Section 3 of this Article. If this Agreement has not come into force by December 31, 1945, the Government of the United States of America shall return such funds to the governments that transmitted them.

(*e*) This Agreement shall remain open for signature at Washington on behalf of the governments of the countries whose names are set forth in Schedule A until December 31, 1945.

(*f*) After December 31, 1945, this Agreement shall be open for signature on behalf of the government of any country whose membership has been approved in accordance with Article II, Section 2.

(*g*) By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority and all territories in respect of which they exercise a mandate.

(*h*) In the case of governments whose metropolitan territories have been under enemy occupation, the deposit of the instrument referred to in (*a*) above may be delayed until one hundred eighty days after the date on which these territories have been liberated. If, however, it is not deposited by any such government before the expiration of this period the signature affixed on behalf of that government shall become void and the portion of its subscription paid under (*d*) above shall be returned to it.

(*i*) Paragraphs (*d*) and (*h*) shall come into force with regard to each signatory government as from the date of its signature.

SEC. 3. *Inauguration of the Fund.*—(*a*) As soon as this Agreement enters into force under Section 1 of this Article, each member shall appoint a governor and the member having the largest quota shall call the first meeting of the Board of Governors.

(*b*) At the first meeting of the Board of Governors, arrangements shall be made for the selection of provisional executive directors. The governments of the five countries for which the largest quotas are set forth in Schedule A shall appoint provisional executive directors. If one or more of such governments have not become members, the executive directorships they would be entitled to fill shall remain vacant until they become members, or until January 1, 1946, whichever is the earlier. Seven provisional executive directors shall be elected in accordance with the provisions of Schedule C and shall remain in office until the date of the first regular election of executive directors which shall be held as soon as practicable after January 1, 1946.

(*c*) The Board of Governors may delegate to the provisional executive directors any powers except those which may not be delegated to the Executive Directors.

SEC. 4. *Initial determination of par values.*—(*a*) When the Fund is of the opinion that it will shortly be in a position to begin exchange transactions, it shall so notify the members and shall request each member to communicate within thirty days the par value of its currency based on the rates of exchange prevailing on the sixtieth day before the entry into force of this Agreement. No member whose metropolitan territory has been occupied by the enemy shall be required to make such a communication while that territory is a theater of major hostilities or for such period thereafter as the Fund may determine. When such a member communicates the par value of its currency the provisions of (*d*) below shall apply.

(*b*) The par value communicated by a member whose metropolitan territory has not been occupied by the enemy shall be the par value of that member's currency for the purposes of this Agreement unless, within ninety days after the request referred to in (*a*) above has been received, (i) the member notifies the Fund that it regards the par value as unsatisfactory, or (ii) the Fund notifies the member that in its opinion the par value cannot be maintained without causing recourse to the Fund on the part of that member or others on a scale prejudicial to the Fund and to members. When notification is given under (i) or (ii) above, the Fund and the member shall, within a period determined by the Fund in the light of all relevant circumstances, agree upon a suitable par value for that currency. If the Fund and the member do not agree within the period so determined, the member shall be deemed to have withdrawn from the Fund on the date when the period expires.

(*c*) When the par value of a member's currency has been established under (b) above, either by the expiration of ninety days without notification, or by agreement after notification, the member shall be eligible to buy from the Fund the currencies of other members to the full extent permitted in this Agreement, provided that the Fund has begun exchange transactions.

(*d*) In the case of a member whose metropolitan territory has been occupied by the enemy, the provisions of (*b*) above shall apply, subject to the following modifications:

(i) The period of ninety days shall be extended so as to end on a date to be fixed by agreement between the Fund and the member.

(ii) Within the extended period the member may, if the Fund has begun exchange transactions, buy from the Fund with its currency the currencies of other

members, but only under such conditions and in such amounts as may be prescribed by the Fund.

(iii) At any time before the date fixed under (i) above, changes may be made by agreement with the Fund in the par value communicated under (*a*) above.

(*e*) If a member whose metropolitan territory has been occupied by the enemy adopts a new monetary unit before the date to be fixed under (*d*) (i) above, the par value fixed by that member for the new unit shall be communicated to the Fund and the provisions of (*d*) above shall apply.

(*f*) Changes in par values agreed with the Fund under this Section shall not be taken into account in determining whether a proposed change falls within (i), (ii), or (iii) of Article IV, Section 5 (*c*).

(*g*) A member communicating to the Fund a par value for the currency of its metropolitan territory shall simultaneously communicate a value, in terms of that currency, for each separate currency, where such exists, in the territories in respect of which it has accepted this Agreement under Section 2 (*g*) of this Article, but no member shall be required to make a communication for the separate currency of a territory which has been occupied by the enemy while that territory is a theater of major hostilities or for such period thereafter as the Fund may determine. On the basis of the par value so communicated, the Fund shall compute the par value of each separate currency. A communication or notification to the Fund under (*a*), (*b*) or (*d*) above regarding the par value of a currency, shall also be deemed, unless the contrary is stated, to be a communication or notification regarding the par value of all the separate currencies referred to above. Any member may, however, make a communication or notification relating to the metropolitan or any of the separate currencies alone. If the mem-

ber does so, the provisions of the preceding paragraphs (including (*d*) above, if a territory where a separate currency exists has been occupied by the enemy) shall apply to each of these currencies separately.

(*h*) The Fund shall begin exchange transactions at such date as it may determine after members having sixty-five percent of the total of the quotas set forth in Schedule A have become eligible, in accordance with the preceding paragraphs of this Section, to purchase the currencies of other members, but in no event until after major hostilities in Europe have ceased.

(*i*) The Fund may postpone exchange transactions with any member if its circumstances are such that, in the opinion of the Fund, they would lead to use of the resources of the Fund in a manner contrary to the purposes of this Agreement or prejudicial to the Fund or the members.

(*j*) The par values of the currencies of governments which indicate their desire to become members after December 31, 1945, shall be determined in accordance with the provisions of Article II, Section 2.

Done at Washington, in a single copy which shall remain deposited in the archives of the Government of the United States of America, which shall transmit certified copies to all governments whose names are set forth in Schedule A and to all governments whose membership is approved in accordance with Article II, Section 2.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 420

BANCO DO BRASIL, S. A., *Petitioner,*

v.

A. C. ISRAEL COMMODITY CO., INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

JEROME J. LONDIN,
ERNEST A. GROSS,
MICHAEL A. SCHWIND,
Attorneys for Respondent,
63 Wall Street,
New York 5, N. Y.

HUGO KOHLMANN,
JOHN P. CAMPBELL,
MANUEL R. ANGULO,
CURTIS, MALLET-PREVOST, COLT & MOSLE,
Of Counsel.

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BANCO DO BRASIL, S. A.,

Petitioner,

v.

A. C. ISRAEL COMMODITY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of Special Term of the Supreme Court, New York County, which granted a motion by respondent to vacate the warrant of attachment and the levies made thereunder, is reported at 29 Misc. 2d 229, 215 N. Y. S. 2d 3 (R. 64-67).[1] The order of the Appellate Division, First Department, which unanimously affirmed that lower court's order without opinion, is reported at 13 App. Div. 2d 652, 216 N. Y. S. 2d 669. The order of the Appellate Division, which granted leave to appeal to the New York Court of Appeals, is reported at 13 App. Div. 2d 912, 218 N. Y. S. 2d 545. The opinion of the Court of Appeals of the State of New York and the dissenting opinion (App.

[1] The "R." references are to the pages of the Papers on Appeal from Order which constituted the record in the New York Court of Appeals.

A of Petition), which affirmed the decision below, are reported at 12 N. Y. 2d 371, 239 N. Y. S. 2d 872, 190 N. E. 2d 235.

Jurisdiction

Petitioner invokes this Court's jurisdiction under 28 U. S. C. § 1257(3). The jurisdictional requisite is not satisfied since the Petitioner does not seek the review of a judgment or decree that is final, but of one that is interlocutory, namely, the affirmance of the vacatur of a warrant of attachment, a provisional remedy (Petition pp. 1-2).

Questions Presented

1. Whether 28 U. S. C. § 1257(3) permits this Court to review the affirmance of the vacatur of a warrant of attachment, particularly where an appeal by Petitioner is pending from a dismissal of its complaint in the same case.

2. Whether the International Monetary Fund Agreement has abrogated New York's public policy against the affirmative enforcement by action in its courts of claims based upon foreign revenue laws, not reduced to judgment.

Statement

Petitioner Banco do Brasil, S. A. ("Banco") obtained a warrant of attachment from the Supreme Court of New York, New York County, against the property of Respondent A. C. Israel Commodity Co., Inc. ("Israel") and others (R. 11-15) based upon a verified complaint (R. 17-28) and three affidavits (R. 29-63).

The gravamen of Banco's complaint is that certain exporters of coffee in Brazil and certain importers of coffee in this country conspired to evade Brazil's foreign ex-

change laws and regulations (actually a coffee export tax), the former by failing to assign to Banco in Brazil the dollar proceeds from Brazilian coffee exports and the latter, among them Israel, by purchasing said coffee in New York City at a reduced price with knowledge of the Brazilian exporters' violation of the Brazilian export requirements. Banco, a quasi-governmental agency of Brazil, thus contended that it may sue Israel in New York to recover damages for the alleged violation of Brazil's foreign exchange regulations. There is no claim that Israel participated in the alleged illegal export.

Israel, a Delaware corporation (R. 18) with its principal office in New York City (R. 9), appeared generally in the action (R. 9) and, before answering, moved to set aside the warrant of attachment on the ground, among others, that the application for the warrant failed to state a cause of action in that it would require the enforcement of fiscal measures of Brazil, which is against public policy of New York (R. 7-8). The court of first instance considered the following issue to be determinative of the motion:

> "The question presented in the instant case is whether or not the Bretton Woods Agreement and the cases cited above justify this court in granting a warrant of attachment upon an action in which plaintiff seeks affirmative relief based on foreign currency regulations which were not heretofore enforceable in the courts of this state." (R. 66).

The court concluded that Banco had failed to show a cause of action (R. 67) and vacated the warrant of attachment (R. 5-6).

The order was unanimously affirmed by the Appellate Division of the Supreme Court of New York, First Department, on April 25, 1961 (R. 73-74). Banco there-

upon applied to the Appellate Division for leave to appeal to the Court of Appeals, which was granted on certified questions of law (R. 75-77), as prescribed for appeals from interlocutory orders by New York Civil Practice Act §589.

The Appellate Division certified the following questions to the Court of Appeals (R. 76):

> "1. Does the plaintiff's complaint state facts sufficient to constitute a cause of action?
>
> "2. Was the order of this court entered April 25, 1961, which affirmed an order of the Supreme Court of the State of New York entered on the 28th day of March, 1961, properly made?"

The Court of Appeals affirmed the decision below and answered the first of the certified questions in the negative and the second in the affirmative. This is the order which Banco seeks to have reviewed here.

In the meantime, further proceedings in this same action were had in the lower courts of the State of New York. On April 6, 1961, Israel moved in the Supreme Court, New York County, for judgment on the complaint on the ground, among others, that the complaint failed to state facts sufficient to constitute a cause of action (S.R.).[2] By order of May 19, 1961 the motion was granted and the complaint was dismissed (S.R.). The opinion (New York Law Journal, May 17, 1961, p. 14, col. 6) (Appendix A) was based on the order vacating the warrant of attachment and its affirmance by the Appellate Division (S.R.). Banco filed a notice of appeal from the order dismissing the complaint (S.R.). This appeal is now pending.

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[2] S.R. denotes the supplemental record filed by Respondent to demonstrate this Court's lack of jurisdiction under 28 U. S. C. §1257(3), an issue not before the New York Court of Appeals.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO GRANT THE WRIT OF CERTIORARI UNDER THE SECTION INVOKED BY PETITIONER.

Banco invokes this Court's juridiction under 28 U.S.C. §1257(3) which provides that certain "final judgments or decrees rendered by the highest court of a State" may be reviewed here (Petition p. 2). This Court lacks jurisdiction thereunder because the judgment below doe. not have the requisite finality under §1257.

A decision is final only when it ends the litigation by fully determining the rights of the parties, and nothing remains to be done in the state court except for the ministerial act of entering judgment. *Department of Banking* v. *Pink*, 317 U. S. 264, 267-8 (1942). The decision below only vacated a provisional remedy, the warrant of attachment.

A state court decision on a provisional remedy is not final, and is not reviewable by certiorari, even though under state law it has become the law of the case and thus determines the final outcome. *Georgia Ry. & Power Co.* v. *Town of Decatur*, 262 U. S. 432, 436-7 (1923).

This court refuses to review interlocutory decrees *Montgomery Building & Constr. Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178 (1952). The appeal to the Appellate Division, an intermediate court of appeals, from the order dismissing the complaint is now pending. Thus, the order, review of which is sought herein, is interlocutory. It will not end the litigation nor permit the entry of judgment. Accordingly, certiorari should be denied.

II

THE PETITION FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Court of Appeals of New York held it was against New York's public policy to accept jurisdiction of the cause of action pleaded by Banco, because it would involve the affirmative enforcement by action of a foreign revenue regulation. This decision followed long-established precedent under the common law and the law of New York. *Government of India v. Taylor*, [1955] 1 All E.R. 292 (H. L.) *affirming Re Delhi Electric Supply & Traction Co., Ltd.*, [1953] 2 All E.R. 1452 (C. A.); *City of Philadelphia v. Cohen*, 11 N. Y. 2d 401, 230 N. Y. S. 2d 188, 184 N. E. 2d 167, *cert. denied*, 371 U. S. 934 (1962); 1 OPPENHEIM, INTERNATIONAL LAW, §144b (7th ed. Lauterpacht, 1948).

The wisdom of this policy of New York is not at issue. Review should be granted only if a substantial claim is made that this public policy violates Petitioner's right under the Constitution or a statute or treaty of the United States. 28 U. S. C. 1257(3). Banco having failed to make any such showing, this Court should not abrogate New York's public policy and permit Banco affirmatively to enforce Brazilian fiscal law by action in the New York courts.

Banco argues that New York's public policy has been abrogated by the spirit of the Articles of Agreement of the International Monetary Fund, December 27, 1945, 60 Stat. 1401, T. I. A. S. No. 1501 ("the Agreement" or the "Bretton Woods Agreement"), parts of which were enacted into law by the Bretton Woods Agreements Act, 59 Stat. 512 (1945), 22 U. S. C. §§286-286k-1. Israel submits that this contention is without merit and that no substantial federal question is presented.

(a) The Agreement is not self-executing.

Treaties entered into by the United States do not automatically become part of its internal law. Unless a treaty is "self-executing", only such parts of it as are specifically enacted by Congress in the form of a statute bind our courts. *United States v. Arredondo*, 31 U. S. (6 Pet.) 691 (1832); *Foster v. Neilson*, 27 U. S. (2 Pet.) 253 (1829).

Whether a treaty is self-executing depends on the treaty and on the intention of Congress when it approves the treaty. The Bretton Woods Agreement is not self-executing. Article IX of its text, which deals with the status, immunities and privileges of the International Monetary Fund (that is, matters which might require adjudication by the courts of the signatories), contains a special provision that "each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law, the principal set forth [in Article IX] * * *" (Article IX, §10).

When Congress enacted the Bretton Woods Agreements Act, 59 Stat. 512, 22 U. S. C. §286, authorizing the President to accept membership in the International Monetary Fund, it specifically provided which sections of the Agreement were to become internal law. §11 of the Act, 59 Stat. 516, 22 U. S. C. §286h reads:

> "The provisions of article IX, sections 2 to 9, both inclusive, and the first sentence of article VIII, section 2(b), of the Articles of Agreement of the Fund * * * shall have full force and effect in the United States and its Territories * * *".

If the Agreement were to have been self-executing, both Article IX, §10 of the Agreement and the above-quoted provision of the Act would have been superfluous. The Agreement was not intended to be self-executing. Our

courts are bound only by those sections of the Agreement which were enacted into internal law. See Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L. J. 421, 423 (1950).

(b) The provisions of the Agreement which have become the internal law of the United States do not support Petitioner's claim.

In order to prevail Banco must show that some provision of the enabling statute or the treaty which has become internal law overrides the public policy of New York. This the petition does not do.

None of the provisions enacted into law by the Bretton Woods Agreements Act, *supra*, have any bearing here. Article IX, §§2-9 deal with the status, the immunities and the privileges of the International Monetary Fund. They do not apply.

Banco argued in the New York courts that Article VIII, §2(b) (the only other provision specifically enacted into law) permits it to bring this action. §2(b) reads as follows:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."

Banco has abandoned its contention below that §2(b) requires the affirmative enforcement by action of the foreign exchange laws of every Bretton Woods signatory and that §2(b) is applicable to this case (Petition pp. 25-

27). Banco concedes the point argued by Israel below and approved by the New York courts that the only effect of §2(b) is to make certain contracts unenforceable in the courts of signatory states. This is the official interpretation of §2(b) by the International Monetary Fund, 14 FED. REG. 5298-09 (1949); see comment by Andre van Campenhout, former General Counsel of the International Monetary Fund, in Note, 2 AM. J. COMP. L. 389 (1953) where he points out (at 391) that according to the official interpretation of the International Monetary Fund, Article VIII, §2(b) makes certain exchange contracts unenforceable but that "the judicial or administrative authorities are not bound to treat such contracts as invalid or in any other way penalize the making or performance of them."

Banco does not claim contracts with any of the defendants. Even if it had, the only effect of the Bretton Woods Agreement would be that courts would sustain a defense of illegality of the contract in a contract action. Bretton Woods does not require our courts to award damages to a foreign government or its agencies, especially where such action is against the public policy of the forum.

(c) The Agreement does not require that New York affirmatively enforce foreign exchange regulations.

Banco is unable to cite a specific provision of the treaty or the enabling act which would require our courts affirmatively to enforce Brazil's exchange regulations. It asks that this effect be ascertained from the spirit of the entire agreement. On the contrary, the spirit of Bretton Woods is hostile to exchange regulations, for one of its purposes is to assist "in the elimination of foreign exchange restrictions which hamper the growth of world trade" (Art. I

(iv)). The Agreement recognizes exchange restrictions only as a necessary evil to be eliminated "as soon as conditions permit" (Art. XIV, §2).

The petition documents profusely but irrelevantly the importance of the Agreement in international fiscal policy and stresses in general terms the duty of the signatories to cooperate in solving international monetary problems. That importance is not an issue in this case. The question here is whether our courts must, under the terms of the Agreement, permit other countries to sue in our courts to collect damages for alleged violations of their currency regulations. In spite of the detail with which the Agreement lays down the duties of the signatories, Banco has not been able to point out one provision which has any bearing on this point. The provisions of the Agreement, with the sole exception noted above, do not even deal with private legal relationships. They do not pretend to create, abolish or modify rights or liabilities of private parties; they deal exclusively with financial and monetary dealings on an intergovernmental level.

Neither can Banco cite any case, anywhere which has permitted such an action to be brought by a foreign country. The conclusion is unavoidable: no such duty to permit recovery of damages in the courts of another country for a violation of currency regulations was intended to be imposed on the countries adhering to the Bretton Woods Agreement. See Meyer, *Recognition of Exchange Controls after the International Monetary Fund Agreement*, 62 YALE L. J. 867 (1953). The author states at 895:

> ". . . . no member need take any positive action to police or enforce another's regulation. So, for example, there is no obligation on a member to procure payment to another member of funds in the former's territory which the latter's regulations

> purport to vest—even though the same regulations render unenforceable the contract under which the funds are held."

This conclusion is suported by the fact that a proposal to make an agreement which is contrary to the exchange regulations of a member country an "offense" was defeated at Bretton Woods (1 PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, 334, 341, 502, 543, 576—referred to in Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L. J. 421, 426, 429 (1950)).

The omission from the Agreement of any duty to prosecute or to permit foreign countries to sue for the alleged violation of foreign exchange regulations is based on sound practical considerations. Many of such exchange laws are extremely detailed and complicated. The exact extent and validity of such laws are many times questioned even within the foreign jurisdiction. If they were enforceable here, our courts would have to decide the validity of such laws under foreign constitutions and, indeed, whether such laws were consonant with our own notions of what is proper. See the concurring opinion of Judge Learned Hand in *Moore v. Mitchell*, 30 F. 2d 600, 604 (2d Cir. 1929), *aff'd*, 281 U. S. 18 (1930).

For example, it appears arbitrary that coffee exporters should receive from Banco only 90 cruzeiros for each United States dollar assigned to said Bank while, by Banco's admission, the value of the dollar on the free market in Brazil was then 220 cruzeiros (R. 24, 32-35). Indeed, Banco's brief in the New York Court of Appeals (p. 39, Appendix B) apparently characterized this as confiscatory when it cited a press release of the International Monetary Fund which spoke of the "amounts which coffee

exporters are now required to surrender without compensation." In *Bank voor Handel en Scheepvart N. V. v. Slatford*, [1953] 1 Q. B. 248, 258, Mr. Justice Devlin (as he then was) expressed the view that, "Presumably any decree which did not provide for full compensation would be held to be confiscatory".

To obligate the courts of this country to pass upon the validity of the fiscal policy and revenue measures of all Bretton Woods signatories would burden our courts and the international relations of the United States. Furthermore, to argue that the Agreement as a whole has created law binding on the courts beyond the provisions specifically enacted denies the express intent of Congress. Congress enacted only the first sentence of Section 2(b), the unenforceability provision, and deliberately omitted the second sentence, which permitted additional cooperation by mutual accord of the signatories. 22 U. S. C. §286 h. There is no further or different obligation for the judicial recognition of exchange control regulations. Only the federal government can now effect the type of mutual accord therein contemplated. If this court were to find a duty of additional cooperation where no such further accord was entered into by the other branches of the federal government, it would invade the prerogative of the executive and legislative branches in the field of international relations.

III

THERE IS NO CONFLICT OF DECISION.

Banco asserts that the decision of New York's Court of Appeals is contrary to this Court's interpretation of Bretton Woods as enunciated in *Kolovrat v. Oregon*, 366 U. S. 187 (1961), and that it ignores this Court's opinions concerning a state's powers and duties as expressed in three other cases. Petitioner's reliance is misplaced.

United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), concerns the respective powers of Congress and of the President in foreign affairs. *United States* v. *Pink*, 315 U. S. 203 (1942), and *United States* v. *Belmont*, 301 U. S. 324 (1937), deal with the express assignment to the United States of certain rights acquired by the Russian Government by expropriation and the recognition of such transfer of title by New York.

No provision of the Agreement has any bearing upon the issues herein. Even if there were such a provision, it would have to be construed, if at all possible, so as not to derogate from the authority of a state. This Court so held in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143 (1938), where it said:

> "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. *United States* v. *Arredondo*, 6 Pet. 691, 748; *Haver* v. *Yaker*, 9 Wall. 32, 34; *Dooley* v. *United States*, 182 U. S. 222, 230; *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Todok* v. *Union State Bank*, 281 U. S. 449, 454."

How can it then be argued that the mere spirit of a treaty has abolished a state's public policy? See also *United States* v. *Pink*, 315 U. S. 203, 230 (1942).

Kolovrat v. *Oregon*, 366 U. S. 187 (1961) does not support Banco. *Kolovrat* held that, under an 1881 Treaty between the United States and Serbia, Yugoslavian claimants were entitled to take under an Oregon intestacy, and that the treaty right had not been impaired by Yugoslavia's foreign exchange laws. This Court noted that Oregon state policy, as enunciated by a law forbidding the inheritance of Oregon property by an alien living in a foreign country whose law creates doubt or uncertainty

concerning reciprocal inheritance rights of Americans, could not be applied to Yugoslav citizens in view of the Bretton Woods Agreement which (*inter alia*) forbids participants (including Yugoslavia) from restricting payments for current transactions or from delaying transfers of funds in settlement of commitments; Article 8 of a Yugoslavian law which expressly recognizes the authority of the provisions of agreements with foreign countries which are concerned with payments; and an Agreement of 1948 which obligates Yugoslavia to continue to grant most-favored nation treatment to Americans in the ownership and acquisition of assets in Yugoslavia and requires Yugoslavia to authorize the payment of debts to United States nationals and, so far as feasible, to permit dollar transfers for such purpose. These agreements, coupled with our continuing adherence to the 1881 Treaty, precluded Oregon from deciding that Yugoslavian laws meeting the standards of those agreements could be the basis for defeating rights conferred by the 1881 Treaty. *Kolovrat* has no application here.

Banco has no existing rights, such as the 1881 Treaty created, confirmed by subsequent agreements such as the 1948 Treaty, which rights a state seeks to divest on grounds of public policy. On the contrary, we have existing public policy which Banco seeks to overturn in reliance upon foreign public law. This is not the teaching of *Kolovrat*.

Finally, there is nothing in the dissent below which supports Banco's claim that the impact of the Bretton Woods Agreement on this case presents a substantial federal question or that the majority view conflicts with federal decisional law. The dissenting opinion discussed New York law and New York public policy. It suggested that, in view of the Bretton Woods Agreement, New York

should change its well-established public policy against enforcement of foreign revenue measures and that, in any case, this policy is not applicable to the present case in which a tortious fraud and conspiracy is alleged. Neither the suggested change in New York's public policy, rejected by the Court of Appeals, nor its interpretation of the complaint presents a federal question. Nowhere does the dissent even hint at raising an issue under the supremacy clause of the Constitution.

Conclusion

The Bretton Woods Agreement neither requires nor justifies a change in New York's public policy; it does not compel our courts to enforce affirmatively by an action for damages a 59% Brazilian coffee export tax imposed in the guise of a foreign exchange regulation. The Agreement did not engraft the fiscal law of all its signatories upon New York's domestic law.

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Jerome J. Londin,
Ernest A. Gross,
Michael A. Schwind,
Attorneys for Respondent,
63 Wall Street,
New York 5, N. Y.

Hugo Kohlmann,
John P. Campbell,
Manuel R. Angulo,
Curtis, Mallet-Prevost, Colt & Mosle,
Of Counsel.

September, 1963

APPENDIX A

Opinion of Mr. Justice Gold of the Supreme Court of New York, N. Y. L. J., May 17, 1961, p. 14, col. 6.

Banco Do Brasil, S. A., v. A. C. Israel Commodity Co., Inc.—The several defendants by five separate motions have moved for dismissal of the complaint. Relief is sought severally under Rules 106 and 107 and General Corporation Law, section 225. Heretofore on motion of the defendant A. C. Israel Commodity Company, Inc., warrant of attachment was vacated upon the issues arising under both Rules 106 and 107 with respect to the sufficiency of the cause as it relates to plaintiff's attempt to recover a penalty or damage sustained by reason of violation of foreign exchange regulations (N. Y. L. J., Nathan, J., March 29, 1961). It was held that:

> "It is clear from the language of section 2(b) that before the provisions and purposes of the Bretton Woods agreement can be *affirmatively* enforced in the courts of this country, it is necessary that additional accord be entered into between this country and other signatory nations. No such additional accord between the United States and Brazil has been indicated in the papers submitted. In the absence of such accords, it is the opinion of this court that the existence of a cause of action has not been shown, as required by section 902 of the Civil Practice Act (Zenith Bathing Pavilion v. Fair Oakes S. S. Corp'n, 240 N. Y. 307).
>
> "Moreover, it appears on the face of the moving papers upon which the attachment was obtained that the computation of plaintiff's alleged damages depends upon the internal currency regulations of Brazil which, as indicated above, are not enforceable in the instant action."

The Appellate Division affirmed the order of vacatur. Whether a cause of action may be asserted against some of the defendants under General Corporation Law section 225 is not now material for such a cause if available to plaintiff must be one which is maintainable upon an enforceable claim. There is no need or reason to withhold determination by reason of the pending application for leave to appeal to the Court of Appeals. All motions are granted. Settle order.

No. 420

Supreme Court, U.S.
FILED
OCT 8 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

BANCO DO BRASIL, S. A., *Petitioner*,

v.

A. C. ISRAEL COMMODITY CO., INC., *Respondent*.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONER'S REPLY BRIEF

FRANK E. NATHER
300 Madison Avenue
New York 17, New York

ANSEL E. LUXFORD
1210 18th Street, N.W.
Washington, D. C. 20036

Attorneys for Petitioner

Of Counsel:

PEDLEY, MANN, RIEMER & LUXFORD
RICHARD L. NEWMAN

ROBERT STERLING ADAMS, WASHINGTON, D. C.

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MISCELLANEOUS:

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PETITIONER'S REPLY BRIEF

Respondent in his Brief in Opposition, p. 5, asserts that this Court is without jurisdiction to grant the writ of certiorari in the case at bar because the judgment for which review is sought is not "final" within the meaning of 28 U.S.C. § 1257. The error of that assertion is clearly shown by analysis. Moreover, respondent's views seem based largely on the reasoning of the ma-

jority in *Montgomery Building and Construction Trades Council* v. *Ledbetter Erection Company*, 344 U.S. 178, which if not specifically overruled at the last term of court was expressly not followed. *Local 438 Construction and General Laborers' Union AFL-CIO* v. *Curry*, 371 U.S. 542.

Contrary to respondent's position, this Court's rule concerning finality for purposes of review under § 1257 is not a mechanical one to be applied on the basis of form with substance ignored. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120; *Market Street R. Co.* v. *R.R. Comm. of California*, 324 U.S. 548, 551, and the designation given the judgment by the state practice is not controlling. *Department of Banking* v. *Pink*, 317 U.S. 264, 268. Rather, this Court makes its own ruling on finality after a review of the record, to determine whether there is anything more to be decided. *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 547; *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U.S. 69, 72; *Local 438 Construction and General Laborers' Union AFL-CIO* v. *Curry*, *supra*. This Court has said that for purposes of review, the state court's judgment is final if it is "subject to no further review or correction in any other state tribunal:" and is "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co.* v. *R.R. Comm. of California*, *supra*, p. 551.

The highest court of the State of New York in answering a question certified to it has held that petitioner's complaint does not state a cause of action. That holding was based upon New York State's public policy and, accordingly, there is no amendment to the complaint which can correct its asserted defect. The high-

est court having thus ruled on the merits, there is no discretion in any lower court. Any action which can be taken by any New York State court is as ministerial and mechanical in nature as the entry of judgment on the remittitur. *United States* v. *Pink*, 36 N.Y.S. 2d 961, 965 (1942); *Ex parte Sibbald*, 37 U.S. 488, 492. For any and all practical purposes, the litigation is ended.

> "It is elementary that the decision of an appellate tribunal upon a prior appeal will, in general, be accepted as the law of the case upon a later appeal in the same case and in the same court. The questions of law settled by the court on a prior appeal in the same case will not be reviewed on a second or further appeal." 9, Carmody-Wait, *N. Y. Practice* § 447, p. 144.

The fact that the lower court took action, subsequent to the lower court decision appealed to the Court of Appeals, in the form of granting a "housekeeping" motion (the dismissal of the complaint to clear the docket) with petitioner noting an appeal to preserve the case pending a determination of this petition for certiorari, can make no difference. *Pope* v. *Atlantic Coastline R. Co.*, 345 U.S. 379; *Radio Station WOW, Inc.* v. *Johnson*, *supra*. And, that fact is not altered by any remote possibility that the Court of Appeals at a later date might change its mind. *Market Street R. Co.* v. *R. R. Comm. of California*, *supra*, p. 551.

Petitioner can make no further legal or factual contentions in the state courts of New York and relies solely upon the federal question presented by his petition. Unless there is review in this Court, the action of the New York Court of Appeals is as final as death insofar as petitioner's case is concerned.

There can be no doubt that on the facts as shown by the record of this case the judgment of the New York Court of Appeals meets all the requirements of finality as defined by this Court for the purposes of review under § 1257. *Pope* v. *Atlantic Coastline R. Co., supra; Local No. 438, Construction and General Laborers' Union AFL-CIO* v. *Curry, supra; Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555.

Respectfully submitted,

FRANK E. NATTIER
300 Madison Avenue
New York 17, New York

ANSEL F. LUXFORD
1210 Eighteenth Street, N.W.
Washington, D. C., 20036

Attorneys for Petitioner

Of Counsel:

PEHLE, MANN, RIEMER & LUXFORD
1210 Eighteenth Street, N.W.
Washington, D. C., 20036

RICHARD L. NEWMAN
17 Battery Place
New York 4, New York

October, 1963

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 420

BANCO DO BRASIL, S.A., PETITIONER

v.

A. C. ISRAEL COMMODITY CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES

By order of the Court, dated November 18, 1963, the Solicitor General was invited to express the views of the United States with respect to this case. After consultation with the Department of State and the Department of Treasury, we are of the view that this case does not present a problem requiring resolution by this Court.

The basic issue presented is whether any national policy of the United States, arising out of or related to Article VIII, Section 2(b) of the Bretton Woods Agreement, *requires* the courts of New York State to enforce a tort claim made by a signatory of the agreement against defendants who allegedly conspired to defraud such signatory by illegally circumventing its

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foreign exchange laws and regulations.[1] The relevant provision of the agreement (60 Stat. 1411) is as follows:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

In the present case, the Court of Appeals of the State of New York held that the above clause obliged courts of this country "to withhold judicial assistance to secure the benefits of such contracts"—*i.e.*, exchange contracts which are contrary to a member's exchange control regulations—but that it did not "imply an obligation to impose tort penalties on those who have fully executed them" (Pet. 3a–4a). We agree that in the absence of any further assertion of a national policy respecting enforcement of foreign exchange regulations—whether by international agreement, statute or otherwise—state courts are not required by federal law to go beyond the express terms of the agreement and may, conse-

[1] This memorandum does not discuss the threshold jurisdictional question whether 28 U.S.C. 1257(3) applies—an issue on which we express no view.

quently, refuse to entertain suits based on alleged violations of a signatory's exchange regulations.[2]

1. Neither the language nor the history of Article VIII, Section 2(b) of the Bretton Woods Agreement supports the view that the provision imposes on the domestic courts of member nations an obligation to entertain suits of this nature. The agreement expressly provides only that exchange contracts which violate a member's exchange control regulations are unenforceable. The Executive Directors of the International Monetary Fund, who are the official interpreters of the agreement's provisions (Article XVIII (a), 60 Stat. 1423), have construed Article VIII, Section 2(b) as applicable to contract actions (14 Fed. Reg. 5208), but have not suggested that it reaches any further. In this respect, it is also relevant to observe that when the agreement was drafted, numerous proposals for broadening the enforcement provision of Article VIII, Section 2(b) were considered and rejected. Among these was one which would have made certain exchange transactions which violate the exchange control regulations of any member an offense in the territory of other members. See 1 Proceedings and Documents of the United Nations Monetary and Financial Conference, pp. 334, 341.

Although the second sentence of Article VIII, Section 2(b) authorizes member countries to engage in further co-operative efforts to make exchange control

[2] We express no view on New York's public policy regarding the enforcement of foreign revenue laws and its applicability to the present case, both of which are matters of state law only. Nor do we express any view on the exchange regulations in question.

regulations more effective, such steps are not obligatory but may be the subject of "mutual accord." The United States has not entered into any agreements under this provision. This clause is not self-operative and cannot be said to impose any additional obligations on the courts of member nations.

2. Petitioner contends that notwithstanding the limited scope of Article VIII, Section 2(b), the United States' adherence to the Bretton Woods Agreement *per se* manifests an overriding national policy favoring the enforcement of foreign exchange control regulations, so that the New York courts were compelled to entertain petitioner's tort actio This implied obligation is not sustained by the meaning given to the agreement by the governmental agencies "particularly charged with their negotiation and enforcement," whose construction "is given great weight." *Kolovrat* v. *Oregon,* 366 U.S. 187, 194; see *Factor* v. *Laubenheimer,* 290 U.S. 276, 294–295. Both the Department of State and the Department of Treasury have advised us that, in their view, with which we concur, the bare acceptance of the Bretton Woods Agreement did not establish a national policy requiring the courts of the State of New York to entertain this suit.

3. This Court's conclusions regarding the effect of the Bretton Woods Agreement, as announced in *Kolovrat* v. *Oregon,* 366 U.S. 187, 197–198, are not to the contrary. All that was held in *Kolovrat* was that the Bretton Woods Agreement constituted an expression of national policy on the subject of foreign exchange, which the State of Oregon was not at

liberty to disregard. The claim rejected in *Kolovrat* as inconsistent with this established national policy was based on the assumption that a Bretton Woods member might fail to meet obligations which were *expressly* set out in the agreement. No question as to the scope of an obligation imposed by the agreement was involved. The present case, unlike *Kolovrat,* concerns the meaning to be given to a particular provision in light of the United States' adherence to the agreement.

Since the language and history of the provision is explicit, and since the governmental agencies primarily concerned are not of the opinion that adherence to the agreement *ipso facto* establishes the overriding policy urged by petitioner, we suggest that, from the standpoint of the United States, there is no impelling need for review by this Court.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JANUARY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1963

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JOHN F. DAVIS, CLERK

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---

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES

FRANK E. NATTIER, JR.
300 Madison Avenue
New York 17, New York

ANSEL F. LUXFORD
1210 18th Street, N. W.
Washington 36, D. C.

Attorneys for Petitioner

Of Counsel:

PEHLE, MANN, RIEMER
& LUXFORD
RICHARD L. NEWMAN.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 420

BANCO DO BRASIL, S. A., *Petitioner*,

v.

A. C. ISRAEL COMMODITY CO., INC., *Respondent*.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES

The Court, on November 18, 1963, invited the Solicitor General to file "a brief expressing the views of the United States." Thereafter, and some six weeks later on January 2, 1964, the Solicitor General filed a four and one-half page "Memorandum for the United States." Apart from an argument addressed to an irrelevant point concerning Article VIII, Section 2(b) of the Fund Agreement and an abortive attempt to distinguish *Kolovrat* v. *Oregon*, 366 U.S. 187, the Memorandum for the United States expresses the belief of the Departments of State and Treasury that "in their view . . . the bare acceptance of the Bretton Woods Agreement (sic) did not establish a national policy requiring the Courts of the State of New York to enter-

tain this suit" (Memorandum, p. 4).[1] The Solicitor General also states that he concurs in the opinion expressed by the Departments of State and Treasury, and so suggests that "from the standpoint of the United States, there is no impelling need for review by this Court" (Memorandum, p. 5). But the Solicitor General, although the Court imposed no time limitation upon him, does not favor the Court and Petitioner with any reason for the stated belief of the Departments of State and Treasury and his concurrence. Indeed, it is not clear whether this expression of departmental opinion is based upon reasons of policy, expediency or law or a combination thereof. Neither does he respond in any way to the many reasons we have advanced for our contrary view. See the whole of Points 2 and 3 of our Petition. In short, since we do not question that someone in the Departments of State and Treasury has expressed the unexplained belief which the Solicitor General has transmitted to the Court together with his unexplained concurrence, our Reply must be largely confined to apposite comments on the details of an action of the Solicitor General which could have no pertinent precedent later than the period of struggle between the common-law courts and the fiat of the Stuart kings.

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[1] It is to be noted for purposes of clarity that the references in the Solicitor's Memorandum to the "Bretton Woods Agreement" technically are references to the Articles of Agreement of the International Monetary Fund (or Fund Agreement). The "Bretton Woods Agreements" is a term employed with respect to the two international agreements negotiated at the Bretton Woods Conference in July, 1944, i.e., the Articles of Agreement of the International Monetary Fund and the Articles of Agreement of the International Bank for Reconstruction and Development (World Bank).

(1) So far as the Solicitor General argues anything, he devotes himself largely to an argument (Memorandum, pp. 3-4) that Article VIII, Section 2(b) of the Fund Agreement does not impose an obligation on our courts to entertain suits like this one. Since our Petition makes no contention that Article VIII, Section 2(b) does impose such an obligation, there is no point to the Solicitor General's argument.[2] Our reliance (Petition, Points 2 and 3) is on a national foreign policy evidenced by United States adherence to the *whole* of the Fund Agreement considered in the light of the history of its development by the Executive Branch of our Government, the legislative history of its acceptance and implementation by the Congress, and its place in the context of American foreign policy. Except for the profession of beliefs without supporting argument, the Solicitor General has offered nothing to show our reliance on the whole of the Agreement to be wrong.

(2) The Solicitor General's attempted distinction of *Kolovrat* v. *Oregon*, 366 U.S. 187, is made in four Delphian sentences (Memorandum, p. 4). First the Solicitor General says that what "was held in *Kolo-*

[2] Actually the discussion by the Solicitor General of both Article VIII, Section 2(b) of the Fund Agreement, and of the Fund Agreement generally, suggests that he has misconceived the whole theory of Petitioner's case. Petitioner is not contending that its cause of action arises by virtue of either Article VIII, Section 2(b) or the Fund Agreement generally. Petitioner's cause of action is in tort for damages resulting from the alleged conspiracy of Respondent and others to defraud Petitioner. The Fund Agreement in this context is not the source of Petitioner's right. Rather it is Petitioner's position that by virtue of United States adherence to the Fund Agreement, the State of New York cannot, for reasons of local policy, refuse to entertain Petitioner's claim because the fraud alleged involved Brazil's exchange regulations.

vrat was that the Bretton Woods Agreement constituted an expression of national policy on the subject of foreign exchange, which the State of Oregon was not at liberty to disregard." We agree with that statement if we understand it correctly. We add, however, that the national policy evidenced by adherence to that Agreement which barred the State of Oregon from cutting off the rights of private litigants, as a matter of state policy, is the same national policy in the field of foreign exchange, evidenced by adherence to the same Agreement, which bars New York, in the exercise of state policy, from cutting off rights which the Petitioner otherwise would have as a litigant. Second, the Solicitor General says: "The claim rejected in *Kolovrat* as inconsistent with this established national policy was based on the assumption that a Bretton Woods member might fail to meet obligations which were *expressly* set out in the Agreement". (Underscoring is in original.) We are not sure what that statement means. If the Solicitor General means that *Kolovrat* found an obligation imposed on Yugoslavia by the Agreement not to forbid the export of inherited capital, we answer that the Court found no such obligation imposed by the Agreement, expressly or otherwise, and that no such obligation, in fact, exists. And neither does the Agreement impose any obligation on Brazil to permit coffee exports which do not comply with her exchange regulations. Third, the Solicitor General says: "No question as to the scope of an obligation imposed by the Agreement was involved." Passing over the apparent inconsistency between that statement and the Solicitor General's second sentence, we comment that this case, like *Kolovrat*, does not turn on the scope of Article VIII, Section 2(b), or, as the Solicitor General asserts in his fourth sentence, upon

"the meaning to be given to" that provision "in light of the United States' adherence to the agreement." The obligation imposed by the Agreement upon Yugoslavia and Brazil alike is that foreign exchange controls and restrictions be maintained consistently with the Agreement. In *Kolovrat,* this Court found that "Our National Government's assent to these international agreements [i.e., Fund Agreement and 1948 Agreement between United States and Yugoslavia], coupled with its continuing adherence to the 1881 Treaty, precludes any State from deciding that Yugoslavian laws meeting the standards of those agreements can be the basis for defeating rights conferred by the 1881 Treaty." Similarly, here, our Government's assent to the Fund Agreement precludes New York from deciding that Brazilian exchange laws meeting the standards of the Fund Agreement can be the basis for defeating Petitioner's right to recover in tort for fraud involving such exchange laws. *Kolovrat* and this case are not distinguishable in reason or in fact. Indeed, the significant differences between this case and *Kolovrat* re-inforce the application of *Kolovrat* to this case. See, Petition at p. 15. Finally, in this connection, we quote the conclusion reached by Mr. Joseph Gold, General Counsel of the International Monetary Fund, in his personal analysis of *Kolovrat* in *The Fund Agreement in the Courts* (p. 134)[3]:

> "That is to say, federal policy, as evidenced by the acceptance of the Fund Agreement by the United States, made it necessary for the individual states to give due effect to the circumstance that the Yugoslav exchange control regulations were

[3] Published by the International Monetary Fund, Washington, D. C. 1962. See pp. 128 et seq.

consistent with the Fund Agreement. This shows that the principle that the foreign exchange controls of a member which are consistent with the Fund Agreement cannot be deemed offensive to the public policy of another member is a principle that can go far beyond the recognition of exchange controls which is prescribed by Article VIII, Section 2(b)."

(3) Since *Kolovrat* is not distinguishable, the position of the United States as stated in its Memorandum cannot be squared with the position of the United States as noted by the Court in *Kolovrat* (366 U.S. at pp. 196-197).

Neither can the action of the Solicitor General in this case be squared with his recent action in *Banco Nacional de Cuba* v. *Sabbatino*, now pending in this Court (No. 16, October Term, 1963). Stripped of nonessentials, the two cases are basically the same on their facts. In both cases a central bank, as agent of a foreign government (Cuba there, and Brazil here), sued American defendants resident in New York, in the Southern District of New York (*Cuba*) and the New York Supreme Court (*Brazil*) in actions in tort-conversion (*Cuba*) and fraud (*Brazil*). In both cases the cause of action involved a foreign law—a nationalization decree held by the lower courts to violate international law (*Cuba*); and a foreign exchange law which in effect requisitions the proceeds of coffee exports with no suggestion by anyone of a violation of international law (*Brazil*). In both cases, the lower courts *for reasons of local policy* found for the New York residents—the alleged converter (*Cuba*), and, at this stage of the record, the admitted fraudulent conspirators (*Brazil*). Despite these apparently obvious similarities, the action of the Solicitor General in *Cuba* contrasts sharply with his action here. In the

case of *Cuba* he filed a well-reasoned ten page memorandum urging the granting of *certiorari*, and expressed his willingness "to present a full statement of the position of the Executive Branch and supporting argument upon the merits." But in this case of *Brazil* he has, in effect, declined the Court's express invitation to file "a brief," although he suggests that *certiorari* be denied.

Surely, the Solicitor General does not believe that the questions to be determined in this judicial proceeding are settled by his mere announcement of the position of the United States. So it would appear that his Memorandum here amounts to an indirect statement of the following: "Since we (State, Treasury, and Justice) are not yet prepared to state a reasoned position or policy on the problems of this case, we would like a denial of review." But Brazil is entitled to justice in this case; and, since the United States continues to adhere to the Fund Agreement, the continuity and consistency of the Court's decisions on the paramount policies and obligations that arise from that adherence should not be prejudiced by the statement of conclusions which precede reasons. Here, the merits of the controversy and the reasons for granting *certiorari* are closely related, if not identical. Hence, we suggest the particular appropriateness of granting *certiorari* and again inviting the Solicitor General to file "a brief" on the merits.[4] *Cf.* the order of this

[4] Petitioner recognizes that where the views of the United States are sought by the Court there is a distinction to be drawn between a brief statement by the Solicitor urging the granting of the Petition, in which case the full basis for the position of the United States will be briefed if *certiorari* is granted (e.g., *Sabbatino*). But where, as here, the Solicitor opposes the granting of *certiorari* and fails at such time to brief the reasons therefor, neither the Court nor the parties are really in a position to evaluate the validity of the position taken unless it is deemed to be *ex cathedra*.

Court with respect to the Solicitor General in *Robinson* v. *Florida*, 32 L.W. 3187.

Respectfully submitted,

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FRANK E. NATTIER, JR.
300 Madison Avenue
New York 17, New York

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ANSEL F. LUXFORD
1210 18th Street, N. W.
Washington 36, D. C.

Attorneys for Petitioner

Of Counsel:

PEHLE, MANN, RIEMER
& LUXFORD
1210 Eighteenth Street, N. W.
Washington 36, D. C.

RICHARD L. NEWMAN, *Esquire*
17 Battery Place
New York 4, New York

January 1964